Supreme Court, U.S.
FILED

01 425 SEP 10 2001

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of The United States

MICHAEL G. NEW,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

HENRY L. HAMILTON
RATCHFORD & HAMILTON
1531 Laurel Street
Columbia, SC 29201
(803) 779-0700

HERBERT W. TITUS*
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for Petitioner
**Counsel of Record*
September 10, 2001

QUESTIONS PRESENTED FOR REVIEW

1. Is the lawfulness of an order an element of the offense of disobedience of a lawful order, as defined in 10 U.S.C. Section 892(2), and therefore, a question for the military jury, not the military judge, in a court-martial proceeding, as provided for in 10 U.S.C. Section 851, and as required by United States v. Gaudin, 515 U.S. 506 (1995)?

2. If lawfulness is an element of the offense defined in 10 U.S.C. Section 892(2), was the military judge's failure to submit the issue of lawfulness to the military jury in this case "harmless error" under the rule of Neder v. United States, 527 U.S. 1 (1999)?

3. Was the order to don the uniform of the United Nations in this case given without the consent of Congress, and therefore, in violation of Article I, Section 9, of the United States Constitution in that the order, if obeyed, would have conferred upon "a person holding [an] office ... of trust under [the United States a] present, emolument, office or title ... from [a] foreign state"?

4. Is the lawfulness of an order to don the uniform of the United Nations, insofar as that order was generated by, and integrally related to and a component of, a presidential deployment of American soldiers under United Nations command and control in peacetime, a nonjusticiable political question:

(A) When the deployment is challenged as violating Sections 6 and 7 of the United Nations Participation Act (22 U.S.C. Sections 287d and 287d-1);

(B) When the deployment is challenged as placing an American soldier in "involuntary servitude" in violation of the Thirteenth Amendment to the United States Constitution;

(C) When the deployment is challenged as placing an American soldier under the command and control of a foreign officer "exercising significant authority pursuant to the laws of the United States" without his having been appointed in accordance with the appointments clause of Article II, Section 2, of the United States Constitution; and

(D) When the deployment entails a delegation of command and control by the President to a nonsubordinate foreign officer, and that delegation is challenged as violating the mandate that the President "shall be the Commander in Chief of the Army and Navy," as prescribed by Article II, Section 2, of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

TREATY PROVISIONS INVOLVED 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. The Order: Advance Notice 4
2. SPC New's Remonstrance 5
3. The Army's Response 6
4. The Court-Martial: Pretrial 7
5. The Court-Martial: Trial 11
6. The Army Court of Criminal Appeals 11
7. The United States Court of Appeals for the Armed Forces 12

Page

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS CONCERNING THE INTERPRETATION AND APPLICATION OF STATUTES ON ISSUES OF CENTRAL IMPORTANCE TO THE ADMINISTRATION OF THE UNIFORM CODE OF MILITARY JUSTICE ... 13

A. Disregarding the Plain Meaning of the Text and this Court's Precedents, the CAAF Erred in Ruling that the Lawfulness of an Order Is Not an Element of the Offense Defined by 10 U.S.C. Section 892(2) 14

B. In an Attempt to Circumvent United States v. Gaudin, the CAAF Disregarded 10 U.S.C. Section 851(c) 16

C. The Harmless Error Rule of Neder v. United States Does Not Apply to this Case 17

D. The Decisions Below Inexplicably Ignored SPC New's Claim that the Order to Don the UN Uniform Violated Article I, Section 9, of the US Constitution 19

II. THE MISAPPLICATION OF THE "POLITICAL QUESTION DOCTRINE" TO THIS COURT-MARTIAL IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT 21

Page

A. Wrongful Application of the Political Question Doctrine Denied Due Process of Law to SPC New 22

B. Misapplication of the Political Question Doctrine Directly Conflicts with this Court's Prior Rulings 26

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Article I, Section 9 ..... 2, 8, 19, 20
Article II, Section 2 ..... 1, 8, 22, 27
Thirteenth Amendment 2, 8, 22, 26, 28

TREATIES
United Nations Charter, Chapter VI 2, 27
United Nations Charter, Chapter VII ..... 2, *passim*

STATUTES
5 U.S.C. Section 7342 ..... 2, 21, 22
10 U.S.C. Section 851 ..... 2, 16, 17, 18
10 U.S.C Section 867(a)(3) 1
10 U.S.C. Section 892(2) ..... 1, *passim*
22 U.S.C. Section 287d ..... 2, *passim*
22 U.S.C. Section 287d-1 ..... 2, 9, 22, 26
28 U.S.C. Section 1259 (3) 1

REGULATIONS
Army Regulation 670-1 ..... 2, 9, 19

CASES
Arver v. United States, 245 U.S. 366 (1918) 28
Bailey v. Alabama, 219 U.S. 219 (1911) 28
Baker v. Carr, 369 U.S. 186 (1962) 27
Bowsher v. Synar, 478 U.S. 714 (1986) 29
Buckley v. Valeo, 424 U.S. 1 (1976) 28
Butler v. Perry, 240 U.S. 328 (1916) 28
Crane v. Kentucky, 476 U.S. 683 (1986) 25
Degen v. United States, 517 U.S. 820 (1996) 26
Fleming v. Page, 50 U.S. (9 How.) 603 (1850) 29
Freytag v. Commissioner, 501 U.S. 868 (1991) 28
Harmon v. Brucker, 355 U.S. 579 (1958) 27

Page

Jackson v. Virginia, 443 U.S. 307 (1979) 26
Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986) 27
Morrison v. Olson, 487 U.S. 654 (1988) 28
Neder v. United States, 527 U.S. 1 (1999) 15, 17, 18, 19
Printz v. United States, 521 U.S. 898 (1997) 29
Reid v. Covert, 354 U.S. 1 (1957) 3
Riley v. St. Luke's Hospital, 252 F.3d 749 (5th Cir. 2001) 28
Shoemaker v. United States, 147 U.S. 282 (1893) 28
Simmons v. South Carolina, 521 U.S. 154 (1994) 25
Unger v. Ziemniak, 27 M.J. 349 (1989) 22
United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 15
United States v. Gaudin, 515 U.S. 506 (1995) 12, 16
United States v. Gentle, 16 U.S.C.M.A 437, 37 C.M.R. 57 (1966) 22
United States v. Huet-Vaughn, 43 M.J. 105 (1995) 25
United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967) 24
United States v. Lenox, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972) 24
United States v. McDaniels, 50 M.J. 407 (1999) 22
United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R 329 (1958) 22
United States v. Nieves, 44 M.J. 96 (1996) 22
United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969) 23, 25
United States v. Robinson, 6 U.S.C.M.A. 347, 20 C.M.R. 63 (1955) 22
United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972) 22
United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954) 23

Page

United States ex. rel. New v. Perry, 919 F. Supp. 49 (D.D.C. 1996), *aff'd* New v. Cohen, 129 F.3d 639 (D.C. Cir.) *cert. denied*, 523 U.S. 1048 (1997) 24
Weiss v. United States, 510 U.S. 163 (1994) 28

BOOKS
J. Madison, Notes of Debates in the Federal Convention (Reprint Tansill edition, Norton: N.Y. 1987) 21
W. Winthrop, Military Law and Precedents (U.S. War Dept., Wash., D.C.: 2d ed. 1920) 3, 22

ARTICLES
Fink, "The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security," 19 MD. J. OF INT'L TRADE (1995) 20
Glennon, "The Constitution and Chapter VII of the United Nations Charter," 85 AM. J. INT'L L. 74 (1991) 21
Houck, "The Command and Control of United Nations Forces in the Era of 'Peace Enforcement,'" 4 DUKE J. OF COMP. & INT'L L. 1 (1993) 3
Reinhardt, "The United States Military and United Nations Peacekeeping Operations, 19 HOUS. J. INT'L L. 245 (1996) 20

MANUALS
Military Judge's Benchbook 22
Manual for Courts-Martial 15, 22
Rules of Practice Before Army Courts-Martial, Paragraph 15A (Jan. 1, 2001) 18

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael G. New respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces affirming petitioner New's court-martial conviction for disobedience of an order in violation of 10 U.S.C. Section 892(2) and sentence to a bad conduct discharge.

OPINIONS BELOW

The military judge's decisions denying petitioner's pretrial motions contesting the lawfulness of the order, and refusing petitioner's request that the issue of lawfulness be submitted to the military jury, were entered on January 19, 1996 (App. 131a) and are unreported. The court-martial's finding of guilt (App. 132a) and sentence to a bad conduct discharge (App. 133a) were entered on January 24, 1996 and are unreported. The decision of the United States Army Court of Criminal Appeals (ACCA) (App. 79a), affirming the military judge's rulings and the military jury's finding and sentence, was entered on April 28, 1999 and is reported at 50 M.J. 729 (1999). The decision of the United States Court of Appeals for the Armed Forces (CAAF) (App. 1a) affirming the decision of the ACCA was entered on June 13, 2001, and is reported at 55 M.J. 95 (2001).

JURISDICTION

The CAAF entered its decision on June 13, 2001. Because the CAAF previously granted petitioner's petition for review pursuant to 10 U.S.C. Section 867(a)(3), this Court has jurisdiction under 28 U.S.C. Section 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the commander in chief and appointments provisions of Section 2 of Article II of the United

States Constitution (App. 135a), the foreign office and emoluments provision of Clause 8 of Section 9 of Article I of the Constitution (App. 134a), and the Thirteenth Amendment's prohibition against "involuntary servitude." (App. 136a.)

TREATY PROVISIONS INVOLVED

This case involves Chapter VI and Chapter VII of the United Nations Charter. (App. 137a, 140a.)

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are: Articles 51 and 92(2) of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. Sections 851 and 892(2)) (App. 152a, 154a); Sections 6 and 7 of the United Nations Participation Act (UNPA) (22 U.S.C. Sections 287d and 287d-1) (App. 155a, 156a); and 5 U.S.C. Section 7342 (App. 145a). The regulation involved in this case is Army Regulation (AR) 670-1, "Wear and Appearance of Army Uniforms and Insignia." (App. 159a.)

STATEMENT OF THE CASE

This case concerns the duty of an American soldier to obey a truly extraordinary order. On October 10, 1995, as a direct consequence of then President Clinton's decision to commit United States (US) troops to the United Nations Preventive Deployment Force (UNPREDEP) in the former Yugoslavian Republic of Macedonia (FYROM), Specialist (SPC) Michael G. New, along with his infantry battalion, was ordered to don the uniform of the United Nations (UN). Faced with the prospect not only of putting on a uniform of a foreign entity, but ultimately submitting to the command and control of

foreign military officers,[1] SPC New purposed not to obey an illegal order.

Whether the nation is at peace or at war, a soldier disobeys an order at his peril. If the order comes in a time of war, "the obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full...." W. Winthrop[2], Military Law and Precedents 572 (U.S. War Dept., Wash., D.C.: 2d ed. 1920) (hereinafter Winthrop's Military Law). But when the order comes, "the time being peace, and the order not calling for present action but relating to something to be done in the future, the subordinate, if he apprehends that its execution will seriously impair his rights or privileges, may, at his own risk, respectfully *remonstrate*, setting forth his grounds." *Id.* at 573, n.8 (emphasis original).

The order in this case did not come in a time of war, nor at a time requiring prompt action, but it came in a time of peace, distanced in both time and place from a combat area, giving rise to an opportunity for SPC New to "remonstrate" without putting his country or his fellow soldiers in jeopardy.

---

[1] Until President Clinton "authorized United States ... forces to serve under the command of the United Nations Operation in Somalia," the "American people have nearly always been certain that when their sons and daughters went into harm's way, they did so under the command of United States generals and admirals who took their orders from the President...." Houck, "The Command and Control of United Nations Forces in the Era of 'Peace Enforcement,'" 4 DUKE J. OF COMP. & INT'L L. 1-3 (1993).

[2] As this Court has noted, the author, Colonel William Winthrop, "has been called the 'Blackstone of Military Law.'" *See* Reid v. Covert, 354 U.S. 1, 19, n.38 (1957).

BEST AVAILABLE COPY

1. The Order: Advance Notice

It was in August of 1995, while stationed in Schweinfurt, Germany assigned to the 1st Battalion, 15th Infantry Regiment, 3d Infantry Division (1/15 Infantry) of the US Army, that SPC New, a medic, first learned that the 1/15 Infantry would be deployed in October 1995 as UNPREDEP (originally UNPROFOR) to Macedonia in FYROM. 55 M.J. at 97 (App. 3a-4a). To that end, the 1/15 Infantry was told that each soldier would be required to wear a shoulder patch, blue scarf, badge, blue field cap and blue beret, all bearing the emblem of the UN (the "UN uniform,")[3] and to carry a UN identification card. 55 M.J. at 98 (App. 4a).

Two years earlier, SPC New had enlisted in the US Army, and had served with distinction, having received, in 1995, the Army Achievement Medal for treating a badly injured soldier in an emergency situation. He had served also in 1993 under US command in a US uniform in Kuwait during an operation undertaken by the US Army in cooperation with the UN. R., Exh. A.[4] In August 1995, however, SPC New submitted to his squad and platoon leaders that he believed that the order to don the UN uniform was unlawful (50 M.J. at 734 (App. 83a)) and that he could not obey the order unless it were consistent with his soldier's oath to defend the US Constitution. R., App. Exh. XXVII and D. Exh. N.

---

[3] The 1/15 Infantry battalion commander, Lieutenant Colonel Layfield, testified that these UN accouterments, collectively, were known as "UN uniform," and individually, as the "UN uniform parts." (R. 595-96.)

[4] Record of Trial ("R.") of Michael G. New dated Oct. 24, Nov. 17, and Dec. 13, 1995 and Jan. 18-19, 23-24, 1996. In courts-martial, trial exhibits are marked with capital letters for the defense ("Exh. A") and with Arabic numbers for the prosecution ("Exh. 1"). Pretrial exhibits are called appellate exhibits ("App. Exh.") and are marked with Roman numerals.

On August 23, 1995, SPC New's superiors responded by directing him to research the text and history of the UN Charter and reconsider his position. 55 M.J. at 98 (App. 4a). Thereafter, on August 31, and three times on September 6, 1995, four different noncommissioned officers counseled SPC New to obey the order. R., App. Exhs. XXXI, XXXIII, XXXIV, XXXV. Two of these counselors explained that, if SPC New persisted in his decision to disobey, he would violate Article 92 of the UCMJ, emphasizing that the order was lawful because the President had agreed to send US armed forces on a UN mission. R., App. Exhs. XXXIII, XXXV.

2. SPC New's Remonstrance

Unpersuaded, on September 19, 1995, SPC New remonstrated with his military superiors by submitting a detailed statement explaining why the order to don the UN uniform, as well as the impending deployment under UN command and control, would unconstitutionally transfer his allegiance from the United States of America to a foreign power. Additionally, SPC New reminded his superiors of his prior service in Kuwait and the difference between that service and the impending deployment to UNPREDEP in FYROM:

> I am an American who was recruited for and voluntarily joined the U.S. Army to serve as an American soldier. I am not a citizen of the United Nations. I am not a United Nations Fighting Person. I have never taken an oath to the United Nations, but I have taken the required oath to support and defend the Constitution of the United States of America....
>
> I am not trying to avoid a difficult or dangerous assignment or to get out of the Army. I served in Kuwait last year and have offered to serve anywhere

> in the world, in my American uniform, in the capacity as a U.S. Army medic under American command and U.S. Constitution protections. [R., App. Exh. XXVII.]

Seeking to "avoid controversy," SPC New requested a "transfer," or, if a transfer were impossible, an "honorable discharge," indicating his willingness "to sadly and reluctantly withdraw from the U.S. Army quietly." R., App. Exh. XXVII.

3. The Army's Response

SPC New's remonstrance and requests prompted a further admonition to don the UN uniform, this time from the battalion commander, who explained that the source of the order to don the UN uniform was derived directly from the authority of the President to deploy American soldiers to UNPREDEP in FYROM. 50 M.J. at 734 (App. 83a). *See* R. 597-99.

Afterwards, when SPC New indicated no change of mind, the entire 1/15 Infantry was ordered to attend an "Information Briefing" on the legal basis for the UNPREDEP deployment. On October 2, 1995, an Army judge advocate briefed the troops on the legality of the deployment (50 M.J. at 734 (App. 84a)), concluding with two projected slides, the first posing the question: "Why do we wear U.N. uniform items?" and the second, providing his "official" answer: "Because they look fabulous!"[5] R., App. Exh. VII (pp. 24-25) (App. 166a-168a).

Immediately following this legal briefing, the battalion commander ordered the 1/15 Infantry to report to battalion formation on October 10, 1995, at 0900 hours, in the UN

---

[5] At the court-martial, the briefing judge advocate was asked about that answer: "Is that a joke?" To which, he responded: "One that played pretty well." R. 658.

uniform. 50 M.J. at 734 (App. 84a). On October 4, 1995, two days after the legal briefing, SPC New's company commander ordered the company to report in UN uniform to company formation on October 10, 1995, at 0845 hours. 50 M.J. at 735 (App. 84a-85a). At the time appointed for the company formation, all soldiers in SPC New's company, except SPC New, reported in the UN uniform. SPC New was pulled out of formation for disciplinary processing and, thereafter, declared nondeployable. 50 M.J. at 735 (App. 85a).

4. The Court-Martial: Pretrial

On October 21, 1995, the 1/15 Infantry was deployed to UNPREDEP in FYROM without SPC New, who stayed behind to answer charges that he had violated Article 92(2) of the UCMJ (10 U.S.C. Section 892(2)), as set forth in the following specification:

> In that Specialist Michael G. New, U.S. Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same. [50 M.J. at 735 (App. 86a, n.9).]

At his special court-martial, SPC New filed several pretrial motions challenging the lawfulness of the order to don the UN uniform. SPC New claimed that the order was unlawful because it was issued pursuant to a deployment that violated Sections 6 and 7 of the UNPA, as well as the commander in chief and appointments clauses of Article II, Section 2 of, and

the Thirteenth Amendment to, the US Constitution. SPC New also contended that the order to don the UN uniform violated the foreign office or emoluments clause of Article I, Section 9, of the Constitution. R., App. Exhs. XLVIII, XLIX, LI.

To support the unlawful deployment claims, SPC New introduced sworn testimony and numerous exhibits through retired Marine Lieutenant Colonel David Sullivan, a former CIA analyst, and a former US Senate Foreign Relations Committee staff member, who was qualified as an expert in international law. Mr. Sullivan concluded that, in his expert opinion, the UN operation to which the 1/15 infantry had been deployed was a UN Chapter VII operation which required Congressional approval. 50 M.J. at 736-37 (App. 87a-89a). The prosecution introduced no evidence, asserting primarily that all claims regarding the legality of the deployment raised nonjusticiable political questions. 50 M.J. at 737 (App. 89a).

The military judge ruled against SPC New on all of these statutory and constitutional claims. First, he ruled that the order to don the UN uniform, insofar as it was dependent upon the deployment order, was lawful (R. 426-27; App. 123a-124a); then he ruled that the lawfulness of the deployment was irrelevant because the order to don the UN uniform was issued merely "in preparation for the anticipated deployment of 1/15th Infantry to Macedonia." (R. 428-29; App. 125a-126a). Finally, at the urging of the prosecution, the military judge ruled that all of the claims related to the lawfulness of the order, insofar as they rested on the lawfulness of the deployment, were nonjusticiable political questions. R. 431-33 (App. 129a-131a).

SPC New also claimed that he had no duty to obey the order to don the UN uniform. To that end, he relied on a "Stipulation of Fact," the pertinent part of which stated that the UN uniform had "<u>not</u> been approved by the Director of The

Institute of Heraldry, U.S. Army, as required and mandated under provisions of paragraphs 27-16a and 27-16b of Army Regulation 670-1, 'Wear and Appearance of Army Uniforms and Insignia'"; that "both the Department of Defense and the Department of the Army have not authorized either informally or formally the United Nations insignia and accoutrements"; and that the UN uniform had been "issued to SPC New [only] for the purpose of augmenting his U.S. Army ... BDU ." (emphasis original). R., Exh. P (App. 183a-185a).

In response to this claim, the prosecution asserted that the UN uniform (although otherwise prohibited by AR 670-1) was justified by paragraph 1-18 of AR 670-1 which provided for alterations in the authorized uniform for "safety" purposes in a "maneuver" area. Introducing **no** evidence to support these claims, the prosecutor merely asserted that "Macedonia ... is a maneuver area," and that "the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare." At the same time, the prosecutor maintained that "the Government does not concede Macedonia is a hostile environment." Indeed, he concluded his argument that UN blue is "recognized internationally as off limits to ... combatants," even while insisting that "in Macedonia, we don't have that situation."[6] R. 407-09 (App. 180a-182a).

---

[6] The prosecutor faced a courtroom dilemma. If he contended that UNPREDEP was being deployed to a combatant environment, then the deployment of the 1/15 Infantry would be governed by Section 7 of the UNPA which required Congress's specific approval, as maintained by SPC New and his expert witness. R. 345-49 (App. 173a-176a). On the other hand, if FYROM to which UNPREDEP was being deployed was a noncombatant environment, then his argument that the UN uniform was necessary for safety purposes would evaporate. In the less demanding court of public opinion, the US Army's Office of Chief of Legislative Liaison issued an "Information Paper" maintaining, on the one hand, that "[f]or safety and security reasons, it is imperative that US forces be recognized [by

Notwithstanding the prosecution's insistence that UNPREDEP in FYROM was not a "combat" operation, the military judge ruled, as a matter of law, that the order was lawful, the UN uniform being a safety item in a maneuver area:

> The wearing of distinctive uniforms or uniform accessories easily recognizable and identifiable in a combat environment or potential combat environment has a practical combat function which may enhance both the safety and/or tactical effectiveness of combat-equipped soldiers performing operations. As such, the modification of 1/15th Infantry soldiers' uniforms ... to include the adding of U.N. military uniform accoutrements, had a function specifically to enhance the safety of United States armed forces in Macedonia. [R. 426 (App. 123a)].

At the conclusion of the pretrial proceedings, the military judge ruled that all of SPC New's challenges to the lawfulness of the order to don the UN uniform were, both as to law and fact, interlocutory questions of law within the sole province of the military judge. R. 433, 448-49 (App. 131a). Thus, the military judge prohibited SPC New from submitting any of his factual or legal claims of unlawfulness to the military jury.[7] 55 M.J. at 117, 119 (App. 47a-48a, 51a).

---

the UN uniform] by potential warring parties," and on the other, that American soldiers deployed to UNPREDEP would serve in a "noncombatant capacity." R., App. Exh. VII (App. 166a-168a).

[7] Technically, the "court-martial panel" or the "court-martial members." The term "military jury" is used throughout this petition in accordance with the common parlance of military judges and lawyers. 55 M.J. at 117, n.2 (App. 46a, n.2).

5. The Court-Martial: Trial

At his special court-martial, SPC New exercised his right to be tried by a military jury consisting of at least one-third enlisted members. In light of the military judge's pretrial rulings excluding the issue of lawfulness from the military jury, the Army called only two witnesses. Neither prosecution witness offered any testimony concerning the alleged "safety" purpose of the UN uniform. Nor did the prosecution introduce any testimony that either the situs of the formation, Schweinfurt, Germany (where the order was disobeyed) or Macedonia was a "maneuver" area. R. 578-629.

At the close of the evidentiary portion of the trial, the military judge instructed the jury that the order to don the UN uniform was lawful, and that SPC New had a duty to obey that order, unless the military jury could find that SPC New had no knowledge of the order or was mistaken as to its contents. 55 M.J. at 119-20 (App. 51a-54a). So constrained, on January 24, 1996, the military jury found SPC New guilty, as charged, and sentenced him to a bad conduct discharge. R., App. Exhs. CVI, CVIII (App. 132a-133a).

6. The Army Court of Criminal Appeals

On appeal, the ACCA affirmed the military judge's ruling that the lawfulness of the deployment to Macedonia was either irrelevant to the lawfulness of the order to don the UN uniform, or was a nonjusticiable political question. The ACCA also affirmed the ruling of the military judge that the order to don the UN uniform was a lawful "safety" measure in a "maneuver" area, concluding that the issues of "safety" and "maneuver" area were questions solely for the military judge. 50 M.J. at 736-40 (App. 87a-97a).

7. The United States Court of Appeals for the Armed Forces

On June 13, 2001, the CAAF unanimously affirmed the military judge's ruling that the lawfulness of the order to don the UN uniform, insofar as it was based upon the lawfulness of the Macedonian deployment, was a nonjusticiable political question. 55 M.J. at 108-09, 116, 129-30 (App. 28a-30a; 44a-46a; 75a-76a). It split three to two, however, on whether the lawfulness of the order to don the UN uniform at the time and the place charged was a legal question solely for the military judge, or, as an essential element of the offense, was an issue for the military jury. *Compare* 55 M.J. at 100-06 (App. 9a-23a) *with* 55 M.J. at 115-16, 117-26 (App. 42a-44a, 48a-68a) and 55 M.J. at 129, 130 (App. 74a-75a, 77a).

The plurality of three affirmed on the ground that whether a soldier had a duty to obey an otherwise lawful order, no matter what the facts, was an issue of law for the military judge, because the lawfulness of an order "is not a discrete element of an offense under Article 92." 55 M.J. at 100 (App. 10a). Calling the plurality's opinion a "radical departure from our political, legal and military tradition" (55 M.J. at 115 (App. 42a)), concurring Judge Sullivan "conclud[ed] ... that the lawfulness of the order allegedly violated in this case ... was an element of the charged offense, and accordingly under Article 51(c), and United States v. Gaudin, 515 U.S. 506, 522-23 ... should have been presented to the 'military jury.'" 55 M.J. at 120 (App. 55a). Even so, Judge Sullivan and his concurring colleague, Judge Everett, affirmed SPC New's conviction on the sole ground that the military judge's failure to instruct the military jury on the lawfulness element of the offense was "harmless error." 55 M.J. at 126-28, 130 (App. 68a-72a; 77a-78a).

Chiding the concurring judges, the plurality wondered how, if the military judge's error in usurping the role of the military jury was so egregious, "we – as an appellate court – would have ... more authority than the military judge to render a decision without requiring further proceedings to submit [the issue of lawfulness] to the [military jury]." 55 M.J. at 106 (App. 22a). Moreover, the plurality insisted that SPC New had "clearly produced a large volume of material contesting the lawfulness of the order ... which would be more than sufficient to go before a [miliary jury], if this were an element for resolution by [such jury]." 55 M.J. at 106 (App. 23a).

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS CONCERNING THE INTERPRETATION AND APPLICATION OF STATUTES ON ISSUES OF CENTRAL IMPORTANCE TO THE ADMINISTRATION OF THE UNIFORM CODE OF MILITARY JUSTICE.

At stake in this case is the lawfulness of President Clinton's decision to deploy US troops to UNPREDEP. All of the military courts' rulings that the order to don the UN uniform was lawful as a necessary safety measure in a maneuver area presupposed that it was lawful for the President to have ordered the deployment. 55 M.J. at 100, 106, 126, 127-28, 130 (App. 9a-9b, 23a-24a, 67a, 70a-71a, 77a-78a); 50 M.J. at 739 (App. 94a-96a); R. 425-29 (App. 122a-126a).

For the military courts to have ruled that the order to don the UN uniform was unlawful, then, would have put those courts at odds with the President. In ruling in favor of the

President, however, the military courts put themselves in conflict with this Court, ignoring its prior rulings governing the interpretation and application of statutes as well as other rulings of central importance to the administration of the UCMJ.

A. Disregarding the Plain Meaning of the Text and this Court's Precedents, the CAAF Erred in Ruling that the Lawfulness of an Order Is Not an Element of the Offense Defined by 10 U.S.C. Section 892(2).

SPC New stands convicted of having violated 10 U.S.C. Section 892(2), which reads as follows:

> Any person ... who ... having knowledge of any ... lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order ... shall be punished as a court-martial may direct.

The CAAF divided, three to two, over the question whether the prosecution needed to prove, beyond a reasonable doubt, as an element of the offense, that the order requiring SPC New to don the UN uniform was lawful. According to the CAAF plurality, the "lawfulness of an order, although an important issue, is not a discrete element of the offense." 55 M.J. at 100 (App. 10a). Rather, the plurality reasoned that, according to military **tradition**, issues of law are always to be decided by the military judge, not by the military jury. 55 M.J. at 100-04 (App. 10a-18a). Therefore, the plurality rationalized, Congress must have "inserted the word lawful in the statutes governing disobedience" to address "the judicial role of the court-martial panel rather than creating an element for consideration by the fact finder." 55 M.J. at 104 (App. 18a).

Judges Sullivan and Everett vehemently disagreed, the former calling the plurality's opinion a "radical departure from our political, legal and military tradition." 55 M.J. at 115 (App. 42a). Judge Sullivan stated that the plain words of the statute indicate that "lawfulness" is an element of the offense, and hence to be decided by the military jury, not the judge. 55 M.J. at 120 (App. 55a-56a). Furthermore, he pointed out that the Manual for Courts-Martial "has repeatedly identified the lawfulness of the order ... as an element of this offense." 55 M.J. at 121 (App. 56a). Finally, Judge Sullivan noted that the CAAF had, in 1989, "unanimously stated that '[i]n a prosecution for disobedience, lawfulness of the command is an element of the offense....'" 55 M.J. at 121 (App. 56a).

According to this Court's authoritative framework for ascertaining the elements of a statutory offense, one must "first look to the text of the statute." Neder v. United States, 527 U.S. 1, 13 (1999). This salutary rule is designed to insure that courts "construe the language so as to give effect to the intent of Congress," not to that of judges. United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43, 544 (1940). Thus, this Court does not "look beyond" the "plain meaning" of the words of a statute, unless that meaning leads to "absurd or futile results" or "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *Id.*, 310 U.S. at 543.

The CAAF plurality opinion completely disregarded these ruling precedents, construing 10 U.S.C. Section 892(2) according to its own view of the general inappropriateness of submitting questions of law to a military jury, instead of to a judge, and then reading that policy into the statute. *See* 55 M.J. at 101-02 (App. 11a-13a). In doing so, the plurality also ignored modern military practice and military legal history, both of which support the conclusion that Congress intended

lawfulness to be an element of the offense charged in this case. *See* 55 M.J. at 121-22 (App. 56a-58a).

B. In an Attempt to Circumvent United States v. Gaudin, the CAAF Disregarded 10 U.S.C. Section 851(c).

At stake in the intra-court battle below was not only the proper interpretation of 10 U.S.C. Section 892(2), but also the applicability of United States v. Gaudin, 515 U.S. 506 (1995), to courts-martial. *Compare* 55 M.J. at 104-05 (App.18a-21a) *with* 55 M.J. at 123-26 (App. 62a-68a). According to Gaudin, a statute that makes an issue of law an element of a criminal offense gives rise to a mixed law/fact question for the jury, not for the judge. *Id.*, 515 U.S. at 511-19.

The CAAF plurality candidly confessed that Gaudin "compelled" them "to choose" in this case "between treating lawfulness as an issue of law for the military judge or an element for the [military jury]." 55 M.J. at 102 (App. 13a-14a). To justify their decision to delete lawfulness from the elements of the offense specified in 10 U.S.C. Section 892(2), the plurality insisted that the Gaudin rule must be applied only to civilian criminal cases where the right to trial by jury is constitutionally guaranteed. 55 M.J. at 104 (App. 18a-19a). To justify this limit on Gaudin, the plurality maintained that military policy dictated that "the validity of regulations and orders of critical import to the national security" should be matters of law for the judge, lest, if they were submitted to the military jury, they "be subject to unreviewable and potentially inconsistent treatment by different court-martial panels." 55 M.J. at 105 (App. 20a-21a).

It is not for the CAAF to use military policy as a tool to delete an element from a Congressionally-defined offense. As Judge Sullivan pointed out in his concurring opinion, Congress

also enacted 10 U.S.C. Section 851(c) which prescribes that the military jury, like its civilian counterpart, "must decide whether the elements of an offense have been proved by the Government beyond a reasonable doubt." 55 M.J. at 122-23, 125, n.9 (App. 60a-61a, 65a, n.9). Thus, as Judge Everett noted, whatever the CAAF plurality thought to be the proper role of military juries, Congress, by statute, has dictated that, with respect to the elements of an offense, the military jury must perform the same role as the constitutionally-guaranteed jury. 55 M.J. at 129 (App. 74a-75a).

As was true of the CAAF plurality's failure to interpret 10 U.S.C. Section 892(2) to discern the elements of the offense, so the plurality also disregarded Congress's intent regarding the role of the military jury in adjudicating the elements of that offense, as prescribed by 10 U.S.C. Section 851(c).

C. The Harmless Error Rule of Neder v. United States Does Not Apply to this Case.

Even though concurring Judges Sullivan and Everett concluded that the military judge had erred in his ruling that the lawfulness of the order to don the UN uniform was a legal issue, exclusively for the judge, they decided that, under Neder v. United States, 527 U.S. 1 (1999), the judge's error was "harmless." 55 M.J. at 126-28, 130 (App. 68a-72a, 77a-78a). The plurality strongly disagreed, maintaining that both judges had misread the record, SPC New having "clearly produced a large volume of material contesting the lawfulness of the order." 55 M.J. at 105-06 (App. 22a-23a). This time the plurality was correct, and the two concurring judges erred.

As the plurality pointed out, the Neder rule only applies when the verdict of guilt is "supported by uncontroverted evidence" introduced at trial on every element of the offense,

even the element not submitted to the jury. 55 M.J. at 106 (App. 22a); Neder, 527 U.S. at 45. Otherwise, an appellate court could not rule, as this Court did in Neder, that it was "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.*, 527 U.S. at 52. Neither Judge Sullivan nor Judge Everett made such a ruling, nor could either have so found upon this record.

Judge Sullivan maintained that "the judge **at trial** ... found as fact that the disobeyed order was issued for 'safety' purposes and while on 'maneuver'" (emphasis added). 55 M.J. at 119 (App. 53a). This statement is patently erroneous. The military judge made his findings on safety and maneuver in support of his decision to deny SPC New's **pretrial** motions, **not** "at trial." R. 422-33 (App. 118a-131a). Thus, the military judge's pretrial rulings were not based upon any evidence subsequently introduced at trial, as Judge Sullivan presumed. *See* 55 M.J. at 119-20 (App. 53a-54a). Rather, those rulings were based upon selections from the arguments of the prosecution and the US Army's Office of Chief of Legislative Liaison, the latter of which was contained in a document marked Appellate Exhibit IV. Under the governing court-martial rules, an appellate exhibit may not even be considered by a military jury. *See* Rules of Practice Before Army Courts-Martial, Paragraph 15A (Jan. 1, 2001). Under Neder, then, such pretrial materials could not have constituted the basis for a trial verdict.

Nor does the Neder rule apply to a case such as here, where the evidence introduced at trial contained stipulated facts supporting the claim that the UN uniform was unauthorized. R., D. Ex. P (App. 183a). Even Judge Sullivan conceded that this was "evidence that [the] order to wear UN badges was 'patently illegal.'" 55 M.J. at 127 (App. 70a). Inexplicably, Judge Sullivan later asserted that there was "no real contest on the unlawfulness of the order," because SPC New had

"proffered no evidence that the safety conditions in Macedonia did not make wearing of [the UN uniform] appropriate or that the deployment was not a maneuver within the meaning of AR 670-1." 55 M.J. at 127-28 (App. 71a).

It was not SPC New's burden, however, to disprove the prosecution's case; rather, in light of the stipulated facts that the UN uniform was generally unauthorized, the prosecution had the burden to prove beyond a reasonable doubt that the uniform fit within the "safety" exception. But it did not do so. Judge Sullivan made a herculean effort to make up for the prosecution's omission, citing testimony elicited through two defense witnesses and claiming that such testimony established the "uncontroverted" fact that the "order to wear [the UN] badges was given by [SPC New's] commanders ... for safety purposes." 55 M.J. at 127 (App. 71a). Even a cursory glance at the testimony recorded on the pages cited by Judge Sullivan reveals no such evidence. R. 667, 710 (App. 186a-187a).

Unlike the situation in Neder, SPC New vigorously contested the "safety" and "maneuver" issues at pretrial, noting his objections to the military judge's interlocutory ruling and listing them among the factual issues in dispute. R. 442-44 (App. 177a-179a). SPC New, therefore, was clearly prejudiced. The "harmless error" rule of Neder simply does not apply.

D. The Decisions Below Inexplicably Ignored SPC New's Claim that the Order to Don the UN Uniform Violated Article I, Section 9, of the US Constitution.

In both his pretrial motions and his appellate briefs, SPC New contended that, AR 670-1 notwithstanding, the order to don the UN uniform violated the foreign "emoluments" and

"office" provision of Article I, Section 9, of the US Constitution. Not once did any judge below address this specific claim, although it appears that the CAAF plurality may have attempted to treat it by miscasting SPC New's "transfer of allegiance"claim as though he were "substituting [his] personal judgment of the legality of an order for that of his superiors and the Federal Government." 55 M.J. at 107 (App 24a-25a). This is a serious misconception.

Article I, Section 9, Clause 8, of the US Constitution makes clear that receipt of any "present, emolument, office, or title ... from any ...foreign state" by a "person holding any office ... of trust" under the United States is **not** a matter for the "personal judgment" of any officer of the Federal Government, even when that officer is the President of the United States, but requires the explicit "consent of Congress."

By the order to don the UN uniform, SPC New's military superiors conferred upon SPC New, an American soldier, the office of a UN soldier to serve UNPREDEP in FYROM. There is no Act of Congress authorizing the President to order an American soldier to assume such a foreign office. To the contrary, Section 6 of the UNPA requires specific approval by Congress before the President may order any combatant-type deployment, such as UNPREDEP in FYROM, which is undertaken pursuant to Chapter VII of the UN Charter. R. 345-49 (App. 173a-176a); Reinhardt, "The United States Military and United Nations Peacekeeping Operations, 19 HOUS. J. INT'L L. 245, 267-68 (1996); *See* Fink, "The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security," 19 MD. J. OF INT'L TRADE 1, 25-44

(1995); Glennon, "The Constitution and Chapter VII of the United Nations Charter," 85 AM. J. INT'L L. 74 (1991).[8]

In short, the courts below ignored the fact that SPC New was court-martialed for refusing the uniform of allegiance of a foreign government, contrary to the very purpose of Article I, Section 9, Clause 8, which is to ensure that "officers of the U.S. [are] independent of external influence." J. Madison, Notes of Debates in the Federal Convention 516 (Reprint Tansill edition, Norton: N.Y. 1987).

II. THE MISAPPLICATION OF THE "POLITICAL QUESTION DOCTRINE" TO THIS COURT-MARTIAL IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

The CAAF unanimously ruled that this Court's "political question doctrine" precluded the military courts from adjudicating SPC New's claims that the order to don the UN uniform was unlawful because it was issued pursuant to a presidential deployment of an American soldier in violation of

---

[8] Not only has Congress not consented to presidential action conferring the office of UN soldier on an American soldier, but it has not consented to any American soldier's receiving the UN uniform as a "gift or decoration," pursuant to the provisions of 5 U.S.C. Section 7342. (App. 145a-151a.) There is no question that the UN uniform provided to SPC New was provided by the UN, not the US Army. R., App. Exh. X (App. 166a). Thus, the UN uniform is a "gift or decoration" within the meaning of 5 U.S.C. Section 7342(a)(3) and (4), the receipt of which is banned by 5 U.S.C. Sections 7342(b)(2) and 7342(a)(1)(D), the UN being a "foreign government" under 5 U.S.C. Section 7342(a)(2)(B). The only exception to these rules provided by Congress is for the receipt of "gifts" from a foreign government if "tendered ... as a souvenir or mark of courtesy" (5 U.S.C. Section 7342(c)(1)(A)), an exception that clearly does not apply to the UN uniform ordered here.

Sections 6 and 7 of the UNPA, Section 2 of Article II, and the Thirteenth Amendment of the United States Constitution. This ruling was contrary to precedent, and is plainly wrong.

A. Wrongful Application of the Political Question Doctrine Denied Due Process of Law to SPC New.

Prior to the instant case, the CAAF has consistently required proof that an order "required the performance of a military duty" before it would presume that the order was lawful. *See* United States v. McDaniels, 50 M.J. 407 (1999); *See* United States v. Nieves, 44 M.J. 96, 98 (1996); Unger v. Ziemniak, 27 M.J. 349, 350, 358-59 (1989); United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972); United States v. Gentle, 16 U.S.C.M.A., 437, 37 C.M.R. 57 (1966); United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); United States v. Robinson, 6 U.S.C.M.A. 347, 350-54, 20 C.M.R. 63 (1955). These rulings are reflected in the Military Judge's Benchbook, which instructs that "[a]n order, to be lawful, must relate to specific military duty and be one which the member of the armed services is authorized to give." Military Judge's Benchbook, para. 3-16-3d (Dept. of Army Pamphlet 27-9:1996). Similarly, the Manual for Courts-Martial states that, for an order to be lawful, the officer who issued the order "must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service...." Manual for Courts-Martial, 1969 (Rev. ed.) para. 14.c.(2)(a)(ii). *See* Winthrop's Military Law, *supra,* at 572.

In this case, the prosecution predicated the lawfulness of the order to don the UN uniform upon the authority of a commander to alter the normal US Army uniform for "safety" purposes in a "maneuver" area. In response, the military judge ruled that "the adding of [the] UN ... uniform has a function specifically designed to enhance the safety of United States

armed forces in Macedonia." R. 426 (App. 123a). Had there been no impending order to deploy the 1/15 Infantry to UNPREDEP, then , there would have been no order to don the UN uniform, there being no justifying "safety" reason.

The order to deploy, therefore, "generated" the order to don the UN uniform. In United States v. Noyd, 18 U.S.C.M.A. 483, 489, 40 C.M.R. 195 (1969), the CAAF proclaimed that "[a]n order, apparently valid on its face, may be illegal because it is based on, **or has its generating source in, an unlawful command of a superior** (emphasis added). *See* United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). Had the CAAF applied its ordinary rule, SPC New's claim that the UNPREDEP deployment was unlawful, if sustained, would have defeated the presumption that the order to don the UN uniform was lawful. Thus, the prosecution would have failed to prove a violation of 10 U.S.C. Section 892(2).

The CAAF refused, however, to apply its normal rule, holding instead that the "political question doctrine" precluded the military courts from addressing the lawfulness of the order to deploy. Whether the lawfulness issue is for the military judge (as the CAAF plurality concluded) or an element of the offense for the military jury (as the two concurring CAAF judges maintained), surely CAAF Judge Effron was correct when he stated in his separate opinion below that "the political question doctrine may not be used as an excuse for avoiding issues committed by law to the court-martial process ... [w]here the legal principles are directed at the rights and responsibilities of servicemembers." 55 M.J. at 110-11 (App. 33a).

The plurality concluded that the "rights and responsibilities" of SPC New were not implicated by their decision to avoid his claims concerning the illegality and unconstitutionality of the Macedonian deployment, because

those claims, like a soldier's claim of "conscientious objection," are outside the jurisdiction of the court-martial. 55 M.J. at 106-08 (App. 24a-28a). This ruling, however, directly conflicts with prior rulings of the federal district and appellate courts in a habeas corpus proceeding brought by SPC New to stop the court-martial. United States ex rel. New v. Perry, 919 F. Supp. 491 (D.D.C. 1996), *aff'd*, New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1997). Those courts specifically distinguished SPC New's claim from that of a conscientious objector, noting that the latter's claim, if sustained, entitled the objector to immediate discharge from the military, and hence, was not subject to court-martial jurisdiction. In SPC New's case, however, fully anticipating that the military courts would rule on the merits of SPC New's claims, the two Article III courts ruled that a soldier who is charged with disobedience of a lawful order remains subject to court-martial jurisdiction. Perry, 919 F. Supp. at 496-97, 499; Cohen, 129 F.3d at 642-44, 646.

According to these rulings, then, CAAF's reliance on such conscientious objector cases as United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967), and United States v. Lenox, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972), is totally misplaced. As those cases point out, and as the Article III courts observed in SPC New's habeas proceeding, a conscientious objector whose request for discharge has been wrongfully denied may avail himself of an administrative process for relief. Johnson, 17 U.S.C.M.A. at 92; Lenox, 21 U.S.C.M.A. at 317-19; Perry, 919 F. Supp. at 496-97; Cohen, 129 F.3d at 646-47. The courts in SPC New's two habeas corpus proceedings found no such administrative means available to present a claim of the unlawfulness of an order. Perry, 919 F. Supp at 497; Cohen, 129 F.3d at 646. For the military tribunals to utilize the political question doctrine to deny him his day in court, then, takes away his right to

challenge the unlawfulness of the order to don the UN uniform as having been "generated" by an earlier unlawful order.[9]

The CAAF's ruling – that the political question doctrine justified denying SPC New the right to have his claim that the UNPREDEP deployment was unlawful adjudicated on the merits – while at the same time affirming the lawfulness of the order to don the UN uniform because it was required for "safety" purposes during that same deployment, is simply indefensible. At the very heart of the constitutional prohibition against the deprivation of life, liberty and property except by Due Process of Law is the rule of law, not politics. To permit the Government to rely upon the UNPREDEP deployment to establish its case that the UN uniform was ordered for "safety" purposes in a "maneuver" area, and at the same time to deny SPC New the right to be heard on his challenge to the legality and constitutionality of that deployment, violates the Due Process Clause. *Cf.* Crane v. Kentucky, 476 U.S. 683, 690 (1986); Simmons v. South Carolina, 521 U.S. 154, 175 (1994) (O'Connor, J., concurring) ("[O]ne of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him.")

---

[9] The CAAF's reliance on United States v. Huet-Vaughn, 43 M.J. 105 (1995), is also misplaced. *See* 55 M.J. at 109 (App. 29a-30a). Huet-Vaughn was not even charged with disobedience of an unlawful order, but with "desertion with intent to avoid hazardous duty and shirk important service...." *Id.*, 43 M.J. at 115. In defense, Huet-Vaughn claimed that she did not intend to avoid service in the Persian Gulf, but "to contest the legality of the decision to employ military forces in the ... Gulf." The CAAF ruled her claim to be "a nonjusticiable political question" and "irrelevant" to the offense charged. *Id.*, 43 M.J. at 115. That is not the case here, where the order at issue "has its generating source in ... an unlawful command of a superior." United States v. Noyd, *supra*, 18 U.S.C.M.A. at 489.

Surely, the application of the political question doctrine here, when it deprives SPC New of a critical defense, is "too blunt an instrument for advancing" the Government's claimed interests. *Cf.* Degen v. United States, 517 U.S. 820 (1996). Moreover, because lawfulness is an element of the offense, the CAAF ruling contradicts the Due Process Clause, which obligates the Government to prove beyond a reasonable doubt every element of an offense. Jackson v. Virginia, 443 U.S. 307, 316 (1979).

B. Misapplication of the Political Question Doctrine Directly Conflicts with this Court's Prior Rulings.

In his pretrial motions, SPC New laid out a fivefold challenge to the legality of the deployment to UNPREDEP in FYROM. Two of those challenges claimed violations of Sections 6 and 7 of the UNPA. The other three were constitutional claims, alleging violations of the commander in chief and appointments clauses of Article II, Section 2, of the US Constitution, and of the Thirteenth Amendment. The CAAF dismissed all five of these claims as nonjusticiable political questions.

To reach this conclusion, the CAAF plurality mischaracterized SPC New's five distinct claims as a single challenge to the "constitutionality of the President's decision to deploy Armed Forces in FYROM." 55 M.J. at 109, 110-11 (App. 29a, 31a-32a). Both concurring judges agreed with this erroneous description. 55 M.J. at 116, 129-30 (App. 45a; 75a). Not only did the CAAF mischaracterize these claims, but it also misapplied this Court's prior rulings in dealing with them.

First, the CAAF misapplied the political question doctrine to preclude review of SPC New's claims that the order to deploy violated Sections 6 and 7 of the UNPA. According to

Section 6 of the UNPA, the President may commit American soldiers to participate in a UN combatant operation undertaken pursuant to Chapter VII of the UN Charter only after securing "by Appropriate Act or joint resolution" Congressional approval of an agreement between the President and the UN. 22 U.S.C. Section 287d (App. 155a). According to Section 7, the President is authorized by Congress to commit American soldiers to a noncombatant role as "observers [or] guards" in a peacekeeping effort under Chapter VI of the UN Charter, limiting the President to assign no more than 1,000 such soldiers at any one time and requiring formal assurance from the President that the soldiers so detailed would not perform combatant roles "contemplated by Chapter VII of the United Nations Charter." 22 U.S.C. Section 287d-1 (App. 156a).

To support these two statutory claims, SPC New presented, through a qualified expert witness, a large volume of evidence, including UN Resolutions related to the combatant nature of UNPREDEP and the absence of Congressional approval. R. 324-75; App. Exh. LXIII with Attachments A-R. Thus, SPC New placed before the military judge credible evidence related to questions of statutory interpretation and application, and of construction and application of a treaty. This Court has ruled that such issues are **not** nonjusticiable political questions. Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229-30 (1986) ("[T]he courts have authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.") Therefore, any claim "that [the President] acted in excess of powers granted him by Congress" is entitled to "judicial relief," even when it involves the military. Harmon v. Brucker, 355 U.S. 579, 581-82 (1958).

As for SPC New's three constitutional claims, Baker v. Carr, 369 U.S. 186 (1962), established that whether such claims

raise political questions depends primarily upon "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Id.*, 369 U.S. at 210. The CAAF ignored such criteria, failing to examine properly each of SPC New's constitutional claims.

As for SPC New's first constitutional claim, that the order to deploy under UN command and control constituted "involuntary servitude" contrary to the Thirteenth Amendment, the issue is clearly justiciable. *See* Bailey v. Alabama, 219 U.S. 219 (1911); Butler v. Perry, 240 U.S. 328 (1916); Arver v. United States, 245 U.S. 366, 390 (1918).

As for SPC New's second constitutional claim that, by the order to deploy as a member of UNPREDEP, he was placed under the command and control of a foreign military officer who had not been appointed in accordance with the procedural provisions set forth in Article II, Section 2, of the US Constitution, this Court has addressed on the merits a variety of claims of such violations of the appointments clause. *See, e.g.*, Shoemaker v. United States, 147 U.S. 282 (1893); Buckley v. Valeo, 424 U.S. 1, 124-41 (1976); Morrison v. Olson, 487 U.S. 654 (1988); Freytag v. Commissioner, 501 U.S. 868 (1991); Weiss v. United States, 510 U.S. 163 (1994). Included among these adjudicated claims is whether an appointee in question is an "officer of the United States," that is, a person "exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, *supra*, 424 U.S. at 126. Whether the UN officer in command and control of UNPREDEP exercises significant authority over American soldiers so deployed is, therefore, a justiciable question. *Cf.* Riley v. St. Luke's Hospital, 252 F.3d 749 (5th Cir. 2001).

Finally, as for SPC New's third constitutional claim that, by deploying American soldiers under the command and control of foreign military officers the order violated the constitutional mandate that "[t]he President shall be Commander in Chief of the Army and Navy of the United States," this, too, is a justiciable question. The constitutional text states that the presidential role as commander in chief is mandatory, not discretionary, indicating on its face that the President's role as commander in chief is a matter of obligation, not a matter of personal will. Thus, an issue of wrongful delegation of executive power, as contrasted with an issue of wrongful exercise, is susceptible to judicial review. *See* Bowsher v. Synar, 478 U.S. 714 (1986).

As Justice Scalia recently observed in Printz v. United States, 521 U.S. 898, 936 (1997), wrongful delegation of executive power "effectively transfers [power] without meaningful Presidential control...." With respect to the President's constitutional powers over America's armed forces, Chief Justice Taney wrote over 150 years ago that the very heart of the role of commander in chief is "to direct the movements of the naval and military forces placed in his command, and to employ them in the manner that he may deem most effectual...." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). Turning American soldiers over to UN command and control – to foreign officers who neither report to nor take orders from the President – however "limited" or "temporary" the situation may be (R., App. Exh. IV (App. 161-65a)), "shatter[s]" both the "vigor and accountability" that the constitutionally-prescribed "unity in the Federal Executive" was designed to preserve. *See* Printz v. United States, *supra,* 521 U.S. at 936.

CONCLUSION

For the reasons stated, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

HENRY L. HAMILTON
RATCHFORD & HAMILTON
1531 Laurel Street
Columbia, SC 29201
(803) 779-0700

HERBERT W. TITUS*
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for Petitioner
**Counsel of Record*
September 10, 2001

APPENDIX

TABLE OF CONTENTS — APPENDIX

Page

OPINIONS BELOW

United States, v. *Michael G. New*, 55 M.J. 95, 2001 CAAF LEXIS 676 (2000) 1a

United States v. *Michael G. New*, 50 M.J. 729, 1999 CCA LEXIS 95 (1999) 79a

Military trial judge's pretrial rulings 118a

Court-Martial's Finding of guilt 132a

Court-Martial's Sentence of bad conduct discharge ... 133a

CONSTITUTION, TREATIES, STATUTES, REGULATIONS

United States Constitution, Article I, Section 9, Clause 8 ..... 134a

United States Constitution, Article II, Section 2, Clauses 1 and 2 ..... 135a

United States Constitution, Amendment 13 ..... 136a

United Nations Charter, Chapter VI 137a

United Nations Charter, Chapter VII 140a

5 USC Section 7342 ..... 145a

10 USC Section 851 ..... 152a

10 USC Section 892 ..... 154a

Page

22 USC Section 287d 155a

22 USC Section 287d-1 ..... 156a

Army Regulation 670-1, Part Two, Chapter 3
[Selected sections] 159a

PRETRIAL RECORD

Appellate Exhibit IV – Information Paper (Office of
Chief of Legislative Liaison) 161a

Appellate Exhibit VII – JAG Information Briefing
Excerpt 166a

Appellate Exhibit X – Troop Contributing Nations –
Aide Memoire 169a

Record Pages 345-49 – Testimony of David Sullivan
(Summary of findings re UN operation in FYROM) . 173a

Record Pages 442-44 – Argument of Defense Counsel
(Fact Issues which render lawfulness of order a jury
issue) 177a

Record Pages 407-09 – Prosecution Argument ("Safety"
purpose and "maneuver" area under AR 670-1) 180a

TRIAL RECORD

Defense Exhibit P – Stipulation of Facts re: UN
uniform 183a

Page

Record Pages 667 and 710 – Trial testimony relied on by Judge Sullivan as having established "safety" purpose of UN uniform 186a

United States, Appellee v. Michael G. NEW, Specialist, U.S. Army, Appellant

No. 99-0640

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

55 M.J. 95; 2001 CAAF LEXIS 676

February 4, 2000, Argued

June 13, 2001, Decided

PRIOR HISTORY: [**1] Crim. App. No. 9600263. Military Judge: W. Gary Jewell.

DISPOSITION: Decision of the United States Army Court of Criminal Appeals affirmed.

COUNSEL: For Appellant: Henry L. Hamilton (argued); Major Norman R. Zamboni (USAR) and Captain Blair T. O'Connor (on brief).

For Appellee: Captain Kelly D. Haywood (argued); Colonel Russell S. Estey, Lieutenant Colonel Eugene R. Milhizer, and Major Patricia A. Ham (on brief).

JUDGES: CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE and EFFRON, JJ., joined. EFFRON, J., filed a concurring opinion. SULLIVAN, J., filed an opinion concurring in the result. EVERETT, S.J., filed an opinion concurring in part and in the result.

OPINIONBY: CRAWFORD

OPINION: [*97] Chief Judge CRAWFORD delivered the opinion of the Court.

INDEX

FACTS 3

DISCUSSION

I. Denial of a Challenge for Cause

II. Consideration of the Legality of an Order as a Question of Law

III. Legality of the Order

IV. Application of the Political - Question Doctrine

Contrary to his pleas, appellant was convicted by a special court-martial consisting of officer and enlisted members of failure to obey an [**2] order to wear his U.S. Army uniform modified with United Nations (UN) accoutrements, in violation of Article 92(2), Uniform Code of Military Justice, *10 USC § 892*(2). Appellant's sentence to a bad-conduct discharge was approved by the convening authority. The Court of Criminal Appeals affirmed the findings and sentence. *50 M.J. 729 (1999).* We granted review of the following issues:

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S CAUSAL CHALLENGE AGAINST A COURT-MARTIAL MEMBER WHO

PREVIOUSLY ORDERED A SUBORDINATE TO DEPLOY TO MACEDONIA.

II. WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO APPELLANT WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.

III. WHETHER THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER TO DEPLOY IN THE UNITED NATIONS UNIFORM WAS LAWFUL.

IV. [**3] WHETHER THE MILITARY JUDGE ERRED BY AVOIDING THE QUESTION OF THE LAWFULNESS OF THE ORDER AND HOLDING THAT LAWFULNESS WAS A NONJUSTICIABLE POLITICAL QUESTION.

For the reasons set forth below, we affirm the decision of the Court of Criminal Appeals.

FACTS

In 1992, the UN established a Protective Force (UNPROFOR) in the Former Yugoslavian Republic of Macedonia (FYROM). The United States contributed troops to this force in 1993 and, in 1995, this force was redesignated as the UN Preventive Deployment Force (UNPREDEP).

In August of 1995, 1st Battalion, 15th Infantry Regiment, 3d Infantry Division (1/15 Infantry) was ordered to assume the FYROM UNPREDEP mission as of November 1, 1995. Appellant, a medic, was attached to a squad of Company A, 1/15 Infantry. Appellant [*98] expressed concern about wearing the UN accoutrements on his U.S. uniform. *50 M.J. at 733-34*. Specifically, uniform modifications included in part the UN blue beret and field cap, a UN blue shoulder patch, blue scarf, and UN badge and identification card to be issued in the FYROM. *Id. at 734 n.7*. On August 23, 1995, appellant was ordered to do research on the history and objectives of the UN [**4] and submitted a written statement of his position at the suggestion of his command. He stated that he could not assess the legality of the order to wear the modified uniform because he did not "understand the legal basis" of the order.

Appellant's concerns were discussed by his father on the Internet and were reported in the popular media and noted by several members of Congress. Appellant's noncommissioned officer leadership, company commander, and battalion commander each spoke with him to alleviate his doubts about the legality of the UNPREDEP mission and the uniform modification. Appellant did not inform anyone in his chain of command that he believed that the UN accoutrements conflicted with Army Regulation (AR) 670-1, Wear and Appearance of Army Uniforms and Insignia (1 September 1992).

Prior to deployment, the unit was granted leave and appellant visited Washington, D.C. In Washington, he met with his future counsel and with several legislators who were concerned about the legality of the UNPREDEP mission and about President Clinton's representations to Congress.

On October 2, 1995, the unit was briefed by the battalion commander on the legality of the FYROM UNPREDEP

mission, [**5] but not on specific battle dress uniform (BDU) modifications. The unit was ordered to wear the modified uniform starting on October 10. *50 M.J. at 734.* Appellant's company commander, Captain (CPT) Palmateer, reissued these orders at a company formation. Appellant turned in the required two sets of BDUs to be altered.

At the next formation, appellant reported in unaltered BDUs and was removed from the formation. Two hours later, he was given a "second chance" to comply with the order by Lieutenant Colonel (LTC) Layfield and refused. Appellant was then declared non-deployable. *50 M.J. at 735.* The order and his responses formed the basis for the charge of disobedience that is the subject of the present appeal.

DISCUSSION

ISSUE I - DENIAL OF A CHALLENGE FOR CAUSE

During individual voir dire, a court-member, Colonel (COL) Dana F. Kwist, was asked whether he had "sent people to operations where they had to wear the blue beret." He responded as follows to questions by one of his civilian defense counsel (CDC2):

COL KWIST: I have a captain in Macedonia that's the headquarters commandant down there. I'm not certain if they're wearing it in Northern Iraq, [**6] but I have a captain that's attached down there, as well.

CDC2: Okay. And did you--what, if any, opinion do you have about wearing that blue beret, as you sent two soldiers to do?

COL KWIST: Well, I don't know that I've ever formed an opinion. I don't really think about it.

CDC2: Do you think about it?

COL KWIST: No, I don't.

CDC2: Well, I mean, do you--you obviously sent two of your subordinates to do that, and the gist of this order--you've read the flyer there--is that somebody disobeyed that. Doesn't that put them at odds, basically, with a decision that you've already made concerning the very same matter?

COL KWIST: I just don't think about it like that. This comes down as a tasking from our corps headquarters, and I fill squares based on the taskings. No, I don't get into that conversation or--at all.

Following voir dire, the defense challenged COL Kwist for cause partly "because he has a captain ... in Macedonia on the very mission that this pertains to."[1] In response, trial counsel argued:
[*99]

And, as to his soldiers, he's merely doing what he's required to do, and that is receiving an order, executing it, and transmitting it. There [**7] is no indication that any of those soldiers raised the issues that the accused raised to him. He wasn't confronted with this issue in sending his soldiers on these deployments. Soldiers obey orders. That's the general rule. And every one of these members of the panel obeys orders, and if they obey an order, that's not a basis for them now to be challenged just because what's at issue in this case is disobeying an order.

---

[1] Appellant also challenged COL Kwist because he read newspaper articles concerning this case. The granted issue, however, only addresses that part of appellant's objection concerning COL Kwist's having ordered a subordinate to deploy to Macedonia. Hence, our review is limited by the granted issue.

The military judge denied this causal challenge, stating that he adopted trial counsel's argument.

Appellant asserts that COL Kwist demonstrated actual and implied bias because he had a personal and professional interest in the result of appellant's trial inasmuch as the challenged member gave [**8] precisely the same order as appellant was accused of disobeying. The Government argues that the defense failed to demonstrate any actual bias by COL Kwist and that appellant waived any claim of implied bias by failing to challenge COL Kwist on that basis at trial.

As we noted in *United States v. Ai, 49 M.J. 1, 4 (1998)*, a servicemember has a "right to impartial court-members to decide his guilt." We have also noted that RCM 912(f)(1)(N), Manual for Courts-Martial, United States (1995 ed.), codifies a general ground for challenge" which includes both actual and implied bias. *United States v. Minyard, 46 M.J. 229, 231 (1997).*[2] The Rule's discussion notes examples of grounds for challenge as including, "a direct personal interest in the result of the trial." Further, RCM 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge."

[**9]

First, we turn to the question whether appellant established actual bias. "The test for actual bias [in each case] is whether any bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Warden, 51 M.J. 78, 81 (1999)*(internal quotation marks omitted).

---

[2] RCM 912(f)(1)(N) states that a member should be excused when it appears that the person "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

COL Kwist's testimony during individual voir dire gave no indication that he would be unable to "yield to the evidence presented and the judge's instructions." When asked whether someone who refused to wear the blue beret would be at odds with him because he had ordered two of his soldiers to deploy to areas potentially requiring them to wear blue berets, he responded: "I just don't think about it like that. This comes down as a tasking from our corps headquarters, and I fill squares based on the taskings. No, I don't get into that conversation or--at all." Moreover, COL Kwist indicated during group voir dire conducted by the military judge that he would base his decision on the evidence presented and the judge's instructions.

"Actual bias is a question of fact" which "is reviewed subjectively, through the eyes of the military judge of the court members. [**10] " *Warden, 51 M.J. at 81* (internal quotation marks omitted). The evaluation of the potential member's mental state is most important:

Where. . .the totality of the circumstances indicate ... that a member is genuinely open to considering all mitigating and extenuating factors which are relevant to a just sentence before arriving at a fixed conclusion, a military judge has broad discretion to grant or deny challenges.

United States v. Rockwood, 52 M.J. 98, 106 (1999) (emphasis in original). Applying this standard, we hold that the military judge did not err in denying the challenge for cause on the basis of actual bias.

Next, we turn to the question of whether appellant established implied bias. "Implied bias is viewed through the eyes of [*100] the public," and "the focus is on the perception or appearance of fairness of the military justice system." *Warden, 51 M.J. at 81* (internal quotation marks omitted).

Appellant argues that COL Kwist would be biased in that he would "lose face" unless appellant were convicted because the legitimacy of his own order would be questioned. COL Kwist's testimony reveals a position quite contrary [**11] to appellant's assertion. He indicated that because of the lack of controversy, he did not view the matter personally but rather as merely "filling squares based on the taskings" from "corps headquarters." As a practical matter, all officers who sit on courts-martial have given or received orders of all kinds as a standard part of military life. It is unlikely that the public would view all officers or all enlisted personnel who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past. Such a standard would make it virtually impossible to find members to sit on cases involving disobedience of orders.

Although "we give the military judge less deference on questions of implied bias," we hold that there was no error under these facts. *Warden, 51 M.J. at 81,* citing *United States v. Youngblood, 47 M.J. 338, 341 (1997).*

ISSUE II - CONSIDERATION OF THE LEGALITY OF AN ORDER AS A QUESTION OF LAW

This case involves some of the most difficult choices that may confront our Government and our men and women in uniform. Faced with increasing instability in the Balkans, the United [**12] States had to decide whether to deploy U.S. troops in support of the peacekeeping effort in the former Yugoslavian Republic of Macedonia, how to structure command and control relationships with other national and international forces in the area, what types of orders were needed to implement those relationships, and how to dispose of alleged violations of such orders. Appellant had to decide whether he should voice his opposition to those decisions, how

to do so, and whether to obey orders that he viewed as unlawful.

Appellant chose to manifest his opposition through disobedience of an order from his commander, and he challenged the legality of that order at his court-martial. He now asks this Court to create an exception to the requirement that the military judge decides questions of law where, as in this case, appellant claims the question of law is an element of the alleged offense. So framed, the issue requires us to make a choice and decide whether lawfulness of the order was a legal question for the military judge or an element that should have been submitted to the members. There are respectable arguments on both sides of the question.

This Court reviews the question of whether [**13] the military judge correctly determined that the issue was a question of law on a de novo standard of review. For the reasons set forth below, we hold that lawfulness of an order, although an important issue, is not a discrete element of an offense under Article 92. We further hold that, in this case, the military judge properly decided the issue of lawfulness as a question of law. See Art. 51(b), UCMJ, *10 USC § 851*(b).

Military personnel are obligated to obey lawful orders and regulations. Arts. 90, 91, and 92, UCMJ, *10 USC § § 890,* 891, and 892, respectively. The term "lawful" recognizes the right to challenge the validity of a regulation or order with respect to a superior source of law.

A "regulation" is an "authoritative rule or principle ...." The term includes "a rule or order having the force of law issued by an executive authority of a government usually under power granted by a constitution or delegated by legislation. ..." Webster's Third New International Dictionary 1913 (1981). An "order" means a "rule or regulation made by competent authority;" "an authoritative mandate usually from a superior

[**14] to a subordinate;" and "a written or oral directive from a senior military or naval officer to a junior telling him what to do but giving him certain freedom of action in complying." Id. at 1588 (emphasis added). [*101]

The role of what is now the military judge (MJ) in ruling on questions of law was discussed during the 1949 House hearings that preceded enactment of the UCMJ. During the hearings, Congressman DeGraffenried asked whether a ruling by a law officer (now MJ) on a question of law would be binding on the court members. Mr. Larkin, a Department of Defense witness, see 33 MJ LXI, responded:

It is absolutely binding, except for the fact of course that any member of the court whether he is a lawyer or otherwise may for his own personal reason not follow them, which is a situation that obtains in any court in the land. The judge may rule on the questions of law and he may instruct the jury and charge them and as it happens the jury goes out and pays no attention to them whatever. But that is something over which no one has any control in any tribunal.

Mr. DeGraffenfried. He acts as the judge on questions of law?

Mr. Larkin. That is right. He acts as an outright judge [**15] on questions of law and his rulings are final and binding. Whether any individual person decides that he doesn't want to follow them or not of course is a different problem.

Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm. (hereafter Hearings), 81st Cong., 1st Sess. 1154 (1949).

As a result of these and other hearings, the Code was passed by Congress. By statute, "the military judge ... shall rule upon all questions of law and all interlocutory questions arising during the proceedings." Art. 51(b), UCMJ, *10 USC § 851*(b).

The Manual for Courts-Martial provides that the military judge shall, "subject to subsection (e) of this rule [regarding finality of rulings], rule on all interlocutory questions and all questions of law raised during the court-martial." RCM 801(a)(4).

In *United States v. Carson, 15 U.S.C.M.A. 407, 408, 35 C.M.R. 379, 380 (1965),* our Court noted in dicta that the legality of an order in a disobedience case is an issue of law, as follows:

Whether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for determination by the triers of [**16] fact. For example, in a prosecution for disobedience of an order, in violation of Article 92, Code, supra, *10 USC § 892,* the court-martial must determine whether the order was given to the accused, but it may not consider whether the order was legal or illegal in relation to a constitutional or statutory right of the accused.

Paragraph 57b, Manual for Courts-Martial, United States, 1969 (Revised edition), expressly treated the legality of an order in a disobedience case as a question of law to be decided by the military judge. See U.S. Dep't of the Army, Pam. No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition (1970), at 10-5 (citing Carson). The provisions of the 1969 Manual have been carried forward in this Discussion accompanying RCM 801(e)(5) in the current Manual:

Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. ...

Questions of the applicability [**17] of a rule of law to an undisputed set of facts are normally questions of law. Similarly,

the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. ...

(Emphasis added.) See Art. 51(b)(the rulings of a military judge are final on "all questions of law," as well as "all interlocutory questions," except for "the factual issue of mental responsibility"). See RCM 801(a)(4); RCM 801(e)(1); RCM 801(e)(4) Discussion; cf. RCM 801(e)(2)(B)(in contrast to the rulings [*102] of the military judge, the rulings of the president of a special court-martial without a military judge are not final with respect to interlocutory questions of fact). See also RCM 801(e)(5) Discussion.

Judge Sullivan concludes that the issue of lawfulness in this case was an element that the military judge had to submit to the members. [**18] We have several significant points of disagreement with that conclusion and with several points raised by his separate opinion.

First, although he asserts that his approach represents a "modern military legal practice," ___ MJ at (3), this Court has never held that "lawfulness" is an element that must be submitted to the members. At most, the cases cited in his separate opinion reflect isolated dicta or descriptions of circumstances in which predicate factual issues were submitted to the members. None of the cases cited by the separate opinion presented an issue in which this Court was required to determine the relative responsibilities of the military judge and the members with respect to deciding lawfulness of an order. In fact, before the Supreme Court's 1995 decision in Gaudin, we were not compelled to choose in a case such as this between treating lawfulness as an issue of law for the military judge or

an element for the members. Prior to Gaudin, the Supreme Court had permitted trial judges to resolve certain legal issues without determining whether the Sixth Amendment required such issues to be submitted to a jury as an element. See, e.g., *Sinclair v. United States, 279 U.S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929).* [**19] As we consider the issue whether lawfulness is an element of the offense of disobedience under Article 92, we note that the ambiguities in the Benchbook, lower court opinions, and dicta in our prior decisions reflect the pre-Gaudin era in which it was not necessary to resolve that issue. The case before us represents the first time, subsequent to Gaudin, that we must answer the question whether lawfulness is an element that must be submitted to the members.

Second, we do not agree that *Unger v. Ziemniak, 27 M.J. 349 (CMA 1989),* controls the present case. As the separate opinion notes, Unger contains language suggesting that "in a prosecution for disobedience, lawfulness of the command is an element of the offense." *Id. at 358.* There are critical differences, however, between Unger and the present case. The issue presented to our Court in Unger did not involve a dispute as to whether lawfulness is a discrete element, nor did the case require us to determine the appropriate division of responsibilities between the military judge and the members in a disobedience case.

Unger involved a pure question of law. Unger had submitted [**20] pretrial motions seeking dismissal of charges on the ground that the order for her to submit to a urinalysis examination was illegal as a matter of law. The military judge rejected the motions, and Unger sought appellate review through a request for extraordinary relief, which the court below denied. We in turn affirmed that decision. See *27 M.J. at 350, 359.* After concluding that the military judge correctly rejected the motions to dismiss the charges, the opinion in

Unger ventured beyond the issue on appeal and suggested how the issue might be addressed "if" there was a trial, indicating that lawfulness was an element to be decided by the members. The Unger opinion did not discuss Carson and provided only the most cursory rationale for the suggestion that lawfulness was an element to be decided by the members. Viewed in that context, the language in Unger does not carry the weight that we would accord a decision directly addressing a controversy briefed by the parties. That aspect of Unger has not been followed, and there is nothing in the opinion which persuades us that we should reject the longstanding approach of the Manual.

Third, we disagree [**21] with the separate opinion's suggestion that lawfulness of an order must be treated as an element of a disobedience offense as a matter of constitutional law. __ MJ (9). The Supreme Court has made clear that in a prosecution for violation of an order or regulation, the Constitution does not require that the validity of the order or regulation be decided by a jury. For example, in *Cox v. United States, 332 U.S. 442, 92 L. Ed. 59, 68 S. Ct. 115 (1947),* both the plurality [*103] (*id. at 452-53)* and the dissent (*id. at 455)* agreed that the validity of the regulation was an issue of law. (Douglas and Black, JJ., dissenting), but agreeing with the plurality that the issue of validity was a question "of law"). See generally *Yakus v. United States, 321 U.S. 414, 433, 444-48, 88 L. Ed. 834, 64 S. Ct. 660 (1944)*(Congress may require challenges to the validity of a regulation governing wartime price controls to be made in the context of a civil proceeding, thereby precluding a defendant from asking the judge, as well as the jury, to rule on the validity of the regulation in a criminal prosecution for violation of the regulation).

Fourth, we do not agree with the separate opinion's reliance [**22] on Winthrop's classic treatise, W. Military Law and Precedents (2d ed. 1920 Reprint), for the proposition that

lawfulness is an element that must be submitted to a "military jury." ___ MJ at (9). Courts-martial in Winthrop's day did not simply function as a civilian "jury"; they consisted solely of members -- there was no equivalent of a military judge -- and the members performed the duties of both judge and jury. See Winthrop, supra at 54-55. It was not until 1951 that courts-martial included law officers who presided with the authority to rule finally on matters of law and did not also serve as members of the panel. See 1 F. Gilligan & F. Lederer, Court-Martial Procedure § 14-10.00 at 544-45 (2d ed. 1999); *United States v. Norfleet, 53 M.J. 262, 266 (2000).* Thus, until 1951, rulings on all legal issues in the Army, including rulings on motions, were made by the president of the court-martial or the law member (Article of War[3] (AW) 8 (1920)), subject to the objection of the other members (see AW 31 (1920)). The material from Winthrop quoted at length simply reflects Winthrop's understanding that an accused had the opportunity to challenge [**23] the validity of regulations before a court-martial -- a body that acted as both judge and jury. The material in Winthrop does not demonstrate that the issue of validity was treated as an element with the Government bearing the burden of proof. Instead, Winthrop made clear that the court-martial should employ traditional legal analysis, applying the presumption of a regulation's validity, to be overturned only if clearly contradicted by other established authority. Id. at 575-76.[4]

---

[3] The Navy and Marines were governed by the Articles for the Government of the Navy, W. Generous, Swords and Scales 10-11 (1973), and did not have a "law officer until 1951. Hearings, supra [___ MJ at (12)] at 1153.

[4] Similar considerations apply with respect to W. De Hart, Observations on Military Law and the Constitution and Practice of Courts-Martial (1846), cited in the separate opinion, ___ MJ at (9-10), which was published a half-century before the 1896 original publication of Winthrop's second edition.

[**24]

Our fifth point of disagreement involves the differences between a court-martial panel and a civilian jury. The Sixth Amendment right to trial by jury does not apply to courts-martial. *Ex Parte Quirin, 317 U.S. 1, 39-45, 87 L. Ed. 3, 63 S. Ct. 2 (1942)*; see also *United States v. Loving, 41 M.J. 213, 285, 287 (1994)*, aff'd on other grounds, *517 U.S. 748, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996)*; *United States v. Curtis, 32 M.J. 252, 267* (CMA), cert. denied, *502 U.S. 952, 116 L. Ed. 2d 354, 112 S. Ct. 406 (1991)*. Accused servicemembers are tried by a panel of their superiors, not by a jury of their peers. Court-martial members are not randomly selected, but instead are chosen by the commander who convenes the court-martial on a "best qualified" basis. See Art. 25(d)(2), UCMJ, *10 USC 825(d)(2)*; *United States v. Tulloch, 47 M.J. 283, 285 (1997)*.

Although the court-martial members perform many of the functions of a jury with respect to the determination of guilt or innocence, throughout most of our history, the [*104] court-martial panel has served as both judge and jury. Even today, the UCMJ retains provisions for special court-martial members to serve as both judge [**25] and jury, with power to adjudicate a sentence of up to one year's[5] confinement. If a military judge

---

The separate opinion also relies on J. Snedeker, Military Justice Under the Uniform Code 599 (1953), ___ MJ at (9). Snedeker's discussion of lawfulness is not based upon any decisions under the Uniform Code of Military Justice requiring the military judge to treat lawfulness as an element rather than as a question of law. The sole citation in Snedeker is to a pre-UCMJ 1945 court-martial, see id. at 599 n.50, which involved the routine issue as to whether an order was lawful, and did not address the allocation of responsibilities between the court-martial and the law officer or military judge -- a position that had not been established in 1945.

5 Art. 19 provides in part:

Special courts-martial may, under such limitations as the President may

cannot be detailed "because of physical conditions or military exigencies," the members of a special court-martial may act as both judge and jury in a case that results in a punitive discharge and up to 12 months' confinement. Art. 19, UCMJ, *10 USC § 819* (as amended Oct. 5, 1999). These provisions and the historical functions of a court-martial panel underscore our conclusion that when Congress inserted the word "lawful" in the statutes governing disobedience, it was addressing the judicial role of the court-martial panel rather than creating an element for consideration by a factfinder.

[**26]

Sixth, we do not agree that application of the principles in *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995),* requires that lawfulness of a regulation or order, in terms of its relationship to other provisions of law, be treated as an element of a disobedience offense. The underlying principle in Gaudin -- that the judge must instruct the jury on the elements of the offense -- is not a matter in controversy because it is well established by statute in the Uniform Code of

---

prescribe, adjudge any punishment not forbidden by this chapter [*10 USCS § § 801* et seq.] except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title [*10 USCS § 827*(b))] (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

Military Justice. See Art. 51(c)(setting forth the relationship between the military judge and the court-martial panel on elements and instructions). Thus, although the Supreme Court found it necessary to resort to constitutional principles in Gaudin, the allocation of responsibilities may be addressed as a matter of statutory interpretation in the military justice system.

The question in the present case is not whether the military judge must instruct the court-martial panel on the elements of an offense. That question is resolved by Article 51(c). Accordingly, treatment of the constitutional issues discussed in Gaudin does not control the present case. The question before us is a matter [**27] of statutory interpretation -- whether, in this case, the issue of lawfulness was an element, and therefore should have been submitted to the members under Article 51(c); and if not an element, whether the military judge properly decided the issue of lawfulness as a question of law under Article 51(b). In that regard, it is noteworthy that Gaudin focused on the interpretation of a unique statute and did not purport to set forth general principles of interpretation applicable to all statutes. Moreover, in Gaudin, there was no dispute as to whether the word "material" constituted an element because the Government "conceded" that point. *Id. at 511.* Both sides also agreed on the definition of "materiality," i.e., that "the statement must have a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *515 U.S. at 509* (internal quotation marks omitted).[6]

---

[6] In *Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999),* the Supreme Court again addressed "materiality," in the context of mail fraud, wire fraud, and bank fraud, under *18 USC § § 1341,* 1343, and 1344. The Neder opinion makes clear that materiality is a fact laden concept and includes a finding of fact that "a reasonable man would attach importance" to the matter or "the maker of the representation knows or has

[**28] [*105]

The present case initially involves the question of whether it is necessary to consider lawfulness of an order as a separate and discrete element under Article 92. Inclusion of the word "lawful" in Article 92 did not add a separate element to the offense of violating a regulation or order. The word "lawful" reflects a question of law -- the validity of the regulation or order with respect to a superior source of law -- that is inherent in the terms "order" and "regulation" under Article 92.[7] The word "lawful" simply reinforces the opportunity for the accused to challenge the validity of the regulation or order with respect to a superior source of law without establishing a separate and distinct element of the offense. In light of the legislative history of the Code and the Manual, we conclude that "lawfulness" is a legal question for the judge. It is entirely different from many other matters which must be submitted to the court members such as "wrongfulness" or "materiality" if a servicemember is charged with a violation of *18 USC § § 1001* under Article 134, UCMJ, *10 USC § 934*. Adjudicating the issue of lawfulness as a question of law [**29] for the military judge ensures that the validity of the regulation or order will be resolved in a manner that provides for consistency of interpretation through appellate review. By contrast, if the issue of lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations and orders of critical import to the national security would be

---

reason to know ... the matter is important." *527 U.S. at 22 n.5*, citing Restatement (2d) of Torts § 538 (1976).

[7] Winthrop recognized that point when he noted, "The word 'lawful' is indeed surplusage, and would have been implied from the word 'command' alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command not lawful may be disobeyed...." Winthrop, supra, at 575.

subject to unreviewable and potentially inconsistent treatment by different court-martial panels.

Seventh, we note a significant internal contradiction in Judge Sullivan's approach. The separate opinion asserts that "lawfulness of an order" is "an essential element of a disobedience offense," __ MJ at (2), [**30] and takes note of "the basic constitutional right of a criminal defendant 'to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.'" __ MJ at (27) (citing Gaudin, supra *515 U.S. at 522-23)* internal quotation marks omitted (emphasis added in the separate opinion). The separate opinion also notes that "a military accused has a codal and constitutional right to have members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense of which he is charged." __ MJ at (12) (footnote omitted). Elsewhere, however, the separate opinion endorses the proposition that the military judge may treat "lawfulness" in a disobedience case as a question of law and that the military judge properly did so in the present case, at least with respect to most of the issues raised by appellant. See __ MJ at (2, 6). We cannot have it both ways. This case requires us to decide, with respect to regulations and orders under Article 92, whether "lawfulness" is a discrete element or whether it is a question of law. If "lawfulness" is indeed [**31] an "essential element," the accused in a military trial has a statutory right for the issue to be resolved by the members under Article 51. If, however, "lawfulness" is a question of law, it may be resolved by the military judge. The cases cited in the separate opinion, __ MJ at (6), support the role of the military judge in deciding issues of law, but do not authorize the military judge to withhold "essential elements" from the members. If we agreed that as a matter of statutory interpretation "lawfulness" established a discrete "essential element," we would hold that the issue

should have been submitted to the members. Because we conclude in this case that "lawfulness" is a question of law, the military judge did not err by resolving it himself without submission to the members.

Finally, we do not agree with Judge Sullivan's assessment of the impact of any error. The separate opinion asserts that the issue of lawfulness of an order was "an essential element of this criminal offense," ___ MJ at (21); [*106] that it was an error of constitutional dimension for the military judge to decide this issue without submitting it to the members; and that the error was so egregious that it [**32] constituted a "radical departure from our political, legal, and military tradition." __ MJ at (2). The separate opinion nonetheless concludes that these considerations are of no moment because, in his view, the order was lawful, and any misstep by the military judge was harmless under *Neder, 527 U.S. at 4.* ___ MJ at (37).

As noted above, if Judge Sullivan is correct in his assertion that lawfulness is an element that must be submitted to the members, we -- as an appellate court -- would have no more authority than the military judge to render a decision without requiring further proceedings to submit it to the members. Judge Sullivan's analysis of the order, which embodies the characteristics of judicial reasoning on an issue of law, underscores our conclusion that the issue at trial was a question of law for resolution by the military judge, rather than an element of an offense requiring a factfinding panel or jury to weigh the evidence.

Judge Sullivan's conclusion that this is a harmless-error case is inconsistent with Neder, which provided that omission of an element could be viewed as harmless only when "supported by uncontroverted evidence" on the question [**33] of materiality in tax-fraud charges. *527 U.S. at 18.* If, as Judge Sullivan suggests, the issue of "lawfulness" of an order is a matter which involves introduction of evidence to be weighed

by the members, appellant clearly produced at trial a large volume of material contesting the lawfulness of the order. Had this been a question for the members of the court-martial panel, it would have been within their province to analyze the controverted material and reach a judicially unreviewable decision to acquit appellant. Similar considerations apply to Senior Judge Everett's separate opinion on this point. Both opinions apply Neder in a manner that discounts the large volume of material submitted by appellant contesting the lawfulness of the order, which would be more than sufficient to go before a panel if this were an element for resolution by the members. In rejecting that material, they effectively treat the question as a matter of law rather than as an element of an offense. As a result, both reach the conclusion -- with which we agree -- "that the order to wear the UN patches and cap was lawful, i.e., it was properly authorized, related to a military duty, [**34] and violated no applicable service uniform regulations." __ MJ at (37).

ISSUE III - LEGALITY OF THE ORDER

This Court reviews the question of whether the military judge correctly determined that an order was lawful on a de novo basis. *United States v. Padgett, 48 M.J. 273, 277.* The test for assessing the lawfulness of an order under Article 92 comes from paragraph 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States (1995 ed.) which states in pertinent part:

The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a

person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.

See *United States v. Hughey, 46 M.J. 152, 154 and n.2 (1997).* Orders are clothed with an inference of lawfulness. See *Hughey, 46 M.J. at 154; United States v. Nieves, 44 M.J. 96, 98 (1996).* [**35] "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime." Para. 14c(2)(a)(i), Part IV, Manual, supra (1995 ed.). Appellant has the burden to establish that the order is not lawful. *Hughey, 46 M.J. at 154; United States v. Smith, 21 U.S.C.M.A. 231, 234, 45 C.M.R. 5, 8 (1972).* [*107]

We hold that the military judge did not err in determining that the order given to appellant to wear his uniform with UN accoutrements was lawful. The military judge correctly determined that the evidence presented by appellant did not overcome the presumption of lawfulness given to military orders and that the order related to military duty.

Appellant argues that (1) the UN insignia violates Army uniform regulations (AR 670-1) by transferring his allegiance to the *United Nations, 50 M.J. at 734,* and (2) the order stems from an illegal deployment of the Armed Forces because President Clinton misrepresented the nature of the deployment to Congress and failed to comply with the [**36] United Nations Participation Act [UNPA].[8] *50 M.J. at 736.* These arguments fail because they would unacceptably substitute

---

[8] As we will rule on Issue IV (see ___ MJ at (34-36)) that the lawfulness of the order to deploy troops as part of the U.N. mission is beyond judicial review because it is a political question, we will decline to address any aspect of appellant's argument on Issue III that implicates this issue.

appellant's personal judgment of the legality of an order for that of his superiors and the Federal Government.

This Court has held that an Air Force Captain disobeyed a lawful order when he refused to fly as a training instructor on a fighter plane that was used in Vietnam. *United States v. Noyd, 18 U.S.C.M.A. 483, 485-86, 40 C.M.R. 195, 197-98 (1969).* The Noyd court noted that "military service is ... a matter of status," like becoming a parent, rather than just a contractual relationship and that status establishes special duties between the soldier and the [**37] *Government. 18 U.S.C.M.A. at 490, 40 C.M.R. at 202.* It further noted that "the fact that a person in a military status determines that he has undergone a change of conscience does not, at that instant and from that time on, endow him with the right to decide what orders are compatible with his conscience." *18 U.S.C.M.A. at 491, 49 C.M.R. at 203.*

The Supreme Court has recognized the importance of the military mission over the beliefs of the individual soldier on the specific issue of uniform requirements. The Court held that Air Force regulations that prohibited wearing a yarmulke are not prohibited by the First Amendment, "even though their effect is to restrict the wearing of the headgear required by his religious beliefs." *Goldman v. Weinberger, 475 U.S. 503, 510, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986).* The Court reasoned that "the desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id. at 509.* the Court stated:

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized [**38] uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity. ... The Air Force considers them as vital ... because its personnel must be

ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

Id. at 508. Based on this reasoning, we conclude that uniform requirements are considered essential to the military mission for the purpose of determining lawfulness.

Although the Goldman decision was overtaken by statute, *10 USC § 774,* which now permits wearing religious apparel under certain conditions, its reasoning on uniform requirements is still sound. If uniform requirements relate to military duty, then an order to comply with a uniform requirement meets the "military duty" test set forth in paragraph 14c(2)(a)(iii).

We recently considered the issue of the "military duty" requirement in finding lawful an order given to a Marine not to drive his personal vehicle because he had been diagnosed with narcolepsy. *United States v. McDaniels, 50 M.J. 407 (1999).* [**39] Distinguishing that case from orders held to be illegal, such as not to drink alcohol or speak to other [*108] soldiers, see cases cited at *50 M.J. at 408,* we held that the order in McDaniels was within military authority because it protected other persons. In appellant's case, it is difficult to think of a requirement more necessary to promoting the basic FYROM UNPREDEP military mission or to safeguarding discipline and morale of deployed troops than uniform requirements. See *United States v. Young, 1 M.J. 433, 435 (CMA 1976)*(identification of personnel and development of esprit de corps justify military uniform requirements for hair cuts).

It is not a defense for appellant to claim that the order is illegal based on his interpretation of applicable law. An order is presumed to be lawful and the defense has the burden to prove illegality unless the order is "palpably illegal on its face." *United States v. Kapla, 22 C.M.R. 825, 827 (AFBR 1956)*

quoting Winthrop's Military Law and Precedents 585-76 (2d ed. 1920 Reprint). This does not, however, allow a soldier to disobey an order because he believes it to be palpably illegal. A case [**40] remarkably similar to this one is *United States v. Wilson, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969).* Private Wilson was denied conscientious-objector status and, after an unauthorized absence, wrote a statement explaining, in part, "I will refuse to wear the uniform of a soldier ever again. I am doing this out of my deeply felt convictions ... and because the Army has given me no other alternative." *19 U.S.C.M.A. at 100-101, 41 C.M.R. at 100-01.* When he later refused to obey an order to wear his uniform, he was charged with willful disobedience. This Court upheld an instruction that personal scruples were not a defense. Citing *United States v. Noyd, supra,* the Court in Wilson reasoned that personal beliefs could not justify or excuse disobedience by a soldier of a lawful order.

His position is like that of the civilian whose religion or conscience is in conflict with lawful orders of the Government ... To allow scruples of personal conscience to override the lawful command of constituted authority would "in effect ... permit every citizen to become a law unto himself." *Reynolds v. United States, 98 U.S. 145, 167, 25 L. Ed. 244 (1879).* [**41] As Noyd indicated, the freedom to think and believe does not excuse intentional conduct that violates a lawful command.

19 U.S.C.M.A. at 101, 41 C.M.R. at 101. The Court in Noyd also noted that allowing private judgment by a soldier as to which orders to obey would be "unthinkable and unworkable," and would mean that "the military need for his services must be compromised." *18 U.S.C.M.A. 491, 40 C.M.R. at 203.* Appellant's arguments are essentially the same ones that were made there, and they should be rejected on the same basis.

We recently reiterated the limited nature of the grounds upon which the lawfulness of an order may be challenged in the context of denied conscientious-objector status. We determined that there was no constitutional right or statutory provision that gave an appellant "authority for a self-help remedy of disobedience." *United States v. Johnson, 45 M.J. 88, 92 (1996),* citing *United States v. Lenox, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972).*

Issue IV - APPLICATION OF THE POLITICAL QUESTION DOCTRINE

The Supreme Court has long recognized the principle of "nonjusticiability": meaning that courts of law should [**42] decline to exercise their authority to decide matters where judicial intervention is deemed inappropriate. Based upon the Constitutional principle of separation of powers in the three branches of Government, judicial review of "a political question" is precluded where the Court finds one or more of the following:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political [*109] decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 218, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962); see also *Flast v. Cohen, 392 U.S. 83, 95, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).*

The Constitution assigns specific military responsibilities to the Executive and Legislative branches [**43] of the Government. The President is Commander-in-Chief of the Armed Forces,[9] but Congress has the power to declare war and to organize, arm, and govern the military.[10]

The determination whether lawfulness of the order to deploy is a political question and thus nonjusticiable is reviewed on a de novo standard. *Padgett, 48 M.J. at 277.*

While the military judge determined that the order to wear the U.N. insignia was lawful, he properly declined to rule on the constitutionality of the President's decision to deploy the Armed Forces in FYROM as a nonjusticiable political question. Courts have consistently refused to consider the issue of the President's use of the Armed Forces. Two recent examples from the Persian Gulf War era are *Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990),* and *United States v. Huet-Vaughn, 43 M.J. 105 (1995).* In the Ange case, the District Court declined to rule [**44] on the legality of deployment of troops in the Persian Gulf despite inconsistent views of *Congress and the President. 752 F. Supp. at 512.* In Huet-Vaughn, we reaffirmed the idea that personal belief that an order is unlawful cannot be a defense to a disobedience charge, holding: "The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." *43 M.J. at 114* (internal quotation marks

---

[9] U.S. Const. Art. II § 2.

[10] U.S. Const. Art. I § 8, cl. 11-14.

BEST AVAILABLE COPY

omitted). The Court further upheld the military judge's decision not to consider evidence relating to the legality of the decision to deploy the *Armed Forces. 43 M.J. at 115.*

The basic nature of the separation-of-powers issue was also discussed in a Vietnam-era case where soldiers disobeyed an order to board a sedan for further transportation to Vietnam on the grounds that American involvement there was itself illegal. *United States v. Johnson, 17 U.S.C.M.A. 246, 247, 38 C.M.R. 44, 45 (1967).* This Court noted that the Supreme Court refused to consider challenges to the President's use of the armed [**45] forces abroad. In addition, the Court distinguished *Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952),* since it involved use of military power in a purely domestic dispute. The Court noted Justice Jackson's concurrence in Youngstown Sheet and Tube Co., where he stated: "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." *343 U.S. at 645.*

Under these standards, we hold that this question qualifies as a nonjusticiable political question.

The decision of the United States Army Court of Criminal Appeals is affirmed.

CONCURBY:
EFFRON; SULLIVAN; EVERETT (In Part)

CONCUR:

EFFRON, Judge (concurring):

I concur in the majority opinion. I write separately to address a number of issues identified in the course of

considering the present case that may bear on future litigation concerning the legality of orders.

I. Application of the Political Question Doctrine

A

According to appellant, the prosecution failed to prove that he had received a lawful order because the order [**46] was in furtherance of actions which he viewed as illegal -- the deployment of American troops to the Republic of Macedonia and the development of command and control functions and associated uniform requirements. As noted in the [*110] majority opinion, these matters were properly resolved by the military judge under the Supreme Court's political question doctrine. See *Gilligan v. Morgan, 413 U.S. 1, 6-12, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973).*

The political question doctrine serves a particularly important function in military trials by ensuring that courts-martial do not become a vehicle for altering the traditional relationship between the armed forces and the civilian policymaking branches of government. Since the days of George Washington, America has demonstrated that military professionalism is compatible with civilian control of the armed forces. With few exceptions, American military personnel have been faithful to the concept that once their advice has been tendered and considered, they are duty-bound to implement whatever policy decisions the civilian leadership may make.

Appellant would have us change the nature of that relationship by requiring courts-martial to adjudicate the relationships [**47] between Congress and the President regarding the deployment of military forces. Consider, for example, the implications of appellant's approach in the context of the Korean conflict, where adversity in frozen fields far from home intensified a bitter national debate over the

propriety of U.S. participation in an undeclared war conducted under the United Nations' auspices. Under appellant's approach, courts-martial would have been authorized to adjudicate the relationships between Congress and the President, potentially permitting members of the armed forces to disobey unpopular orders. There is nothing in the more than 2 centuries of our history as a Nation that suggests courts-martial should be empowered to rule on the propriety of deployment orders as a matter of either constitutional or military law.

B

Appellant not only insists that courts-martial should rule on the legality of deployment orders, but he also contends that the military judge should submit the issue of legality to the members as an essential element of the offense. Such an approach would be even more problematic than permitting judges to adjudicate the legality of deployments because dispositions by members would [**48] produce unreviewable decisions. See Art. 63, UCMJ, *10 USC § 863* (an acquittal is final and unreviewable). Rather than producing the unity and cohesion that is critical to military operations, appellant's approach could produce a patchwork quilt of decisions, with some courts-martial determining that orders were legal and others determining that the same orders were illegal, without the opportunity for centralized legal review that is available for all other issues of law.

C

It is apparent that appellant has carefully considered the legality of the orders at issue and that he has formed sincere, deeply held views about the legal basis for the deployment of his unit and the related matters of command and control and uniform arrangements. Congress has provided him with a variety of means to communicate his views to his superiors and

national policy makers. He may challenge policy through a complaint under Article 138, UCMJ, *10 USC § 938;* he may raise his concerns to the Inspector General of the Department of Defense, 5 USC Appendix; and he may communicate directly with Members of Congress and Inspectors General without interference from [**49] his military superiors and with protections against reprisal, *10 USC § 1034.* The record indicates that he has exercised his right to communicate with Members of Congress. Although Congress has acted from time to time to limit deployments, regulate command and control arrangements, and specify uniform requirements, it has not done so with respect to the issues raised by appellant. Congressional inaction does not entitle him to address such issues through disobedience and then seek the protection of a court-martial, at least to the extent that the issues of concern to him involve political questions committed to the policymaking branches of government rather than rights granted to him by the Constitution, statutes, or regulations.

D

It is important to emphasize that the political question doctrine may not be used as an [*111] excuse for avoiding issues committed by law to the court-martial process. The political question doctrine in a disobedience case arises in a context very different from civil litigation. In the typical civil case, a party initiates litigation as a means of interjecting the courts into a dispute between the two policymaking branches of government. [**50] In a court-martial for disobedience, the Government -- not the accused -- has initiated the litigation. Reliance on the political question doctrine in such circumstances is appropriate only when the legal principles at issue are directed at the allocation of responsibilities between the two policymaking branches of the government. Where the legal principles are directed at the rights and responsibilities of servicemembers, the political question doctrine may not be

used to avoid addressing the legality of orders invoking those principles, even if those questions touch upon the responsibilities of the policymaking branches. Cf. *United States v. Caceres, 440 U.S. 741, 59 L. Ed. 2d 733, 99 S. Ct. 1465 (1979)* (distinguishing between those rules designed to protect the rights of citizens and those designed to affect the management of governmental functions).

Military courts have long considered the legality of orders in cases in which an accused was directed to commit a crime or in which the purported order violated a legal standard designed to preclude commanders from abusing the fundamental rights of their subordinates or directing their subordinates to engage in criminal activities. Likewise, military [**51] courts traditionally have permitted servicemembers to defend against other charges by asserting obedience to lawful orders. Nothing in today's opinion should be viewed as permitting a military judge to avoid ruling on the legality of an order in such a case simply because the issue bears certain attributes of a political question.

II. The Tension Between Prompt Obedience and Challenges to the Lawfulness of Orders

A

The Supreme Court has emphasized that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles, 350 U.S. 11, 17, 100 L. Ed. 8, 76 S. Ct. 1 (1955).* To persevere and prevail amidst the danger, death, destruction, and chaos of armed combat, military personnel must develop the disciplined habit of prompt obedience to the directives of their superiors.

Although modern military practices typically foster opportunities for discussion before a decision is made, prompt obedience is expected once an order is given. The Supreme

Court has observed that "an Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command [**52] in the officer, or the duty of obedience in the soldier." *Parker v. Levy, 417 U.S. 733, 744, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)*, quoting *In re Grimley, 137 U.S. 147, 153, 34 L. Ed. 636, 11 S. Ct. 54 (1890)*. "To accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger, 475 U.S. 503, 507, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986)* (emphasis added).

Although the law expects prompt and instinctive implementation of orders, it does not envision unquestioning obedience. Only "lawful" orders must be obeyed. Art. 92; see RCM 916(d), Manual for Courts-Martial, United States (1998 ed.). There has always been an uneasy tension between the concept of "instinctive obedience" and the expectation that servicemembers will not obey unlawful orders. The present case has brought to light several issues growing out of that tension that may warrant further attention.

First, should the Manual for Courts-Martial provide more detailed guidance as to the appropriate means by which the legality of an order should be raised and adjudicated in a court-martial? Should it be through a motion to dismiss for failure to state an offense on the ground that the illegality deprives [**53] the directive of its status as an "order"? Should it be recast as an affirmative defense? Should both approaches be available?

It is noteworthy that the legality of an order is treated as a defense when it is [*112] raised in the context of crimes other than disobedience offenses - for example, assault or homicide. See RCM 916(d). In one of our earliest cases, *United States v. Trani, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952)*, we considered the procedure for assessing the legality of an order in a disobedience case. We observed that it is a familiar and long-standing principle of military law that the

command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defense.

1 U.S.C.M.A. at 296, 3 C.M.R. at 30 (citing W. Winthrop, Military Law and Precedents 575-76 (2d ed. 1920 Reprint)). After noting that "it does not appear that the order was unlawful on its face," we commented that "it remains to be seen whether it has been shown affirmatively to be illegal." *1 U.S.C.M.A. at 297, 3 C.M.R. at 31* (emphasis added). Trani has never been overruled or distinguished. It could [**54] be viewed as consistent with either an affirmative defense approach or an approach based upon failure to state an offense.

Second, what circumstances should be encompassed by the terms "lawful," "unlawful," and "illegal" as applied to offenses involving obedience or disobedience of orders? Paragraph 415, Manual for Courts-Martial, United States, 1917, at 210, sets this high standard:

To justify from a military point of view a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted.

Subsequent editions of the Manual streamlined this language, relying instead on descriptions of various types of orders within or outside the statute. See para. 134b, Manual for Courts-Martial, U.S. Army, 1928; para. 152b, Manual for Courts-Martial, U.S. Army, 1949; para. 169b, Manual for Courts-Martial, United States, 1951; para. 169b, Manual for Courts-Martial, United States, 1969 (Revised edition); para. 14c(2)(a), Part [**55] IV, Manual, supra (1998 ed.). The current guidance, however, does not address what types of deficiencies affect the validity of an order in the context of a

disobedience offense. Aside from matters involving the political question doctrine, what other questions should be excluded from or included in the concept of lawfulness as it pertains to orders?

Third, are other changes warranted as a result of the manner by which the complexity and scope of modern military operations have significantly altered the nature of military life? The 19th century model, in which military personnel were directed primarily by personal orders from an immediate superior, has been transformed by the 21st century reality into an environment governed by thousands of pages of directives, regulations, standard operating procedures, and policy manuals issued by a variety of military and civilian authorities at service, joint, and international command levels. Under what circumstances should a servicemember be permitted to rely on one of these issuances to disobey a direct command from a superior?

It is well established that a servicemember may defend against a disobedience charge by demonstrating that compliance [**56] with the order would constitute a crime or would violate a standard of law intended to protect significant rights of the servicemember or a third party. Should an order be treated as not "lawful" if it is inconsistent with another issuance, even if that issuance addresses only routine administrative matters? If not, under what circumstances should a servicemember who alleges reasonable reliance on the administrative issuance be permitted to raise a defense of mistake of fact or mistake of law?

Fourth, how should the burden of demonstrating the legality or illegality of an order be allocated? Do the references in the Manual and case law to a "presumption" or "inference" of legality suggest that the production of any information to the contrary negates the presumption and places the burden on the prosecution to prove the legality of the order? Alternatively, in

the context [*113] of an issue of law, should the presumption or inference simply mean that the issue of legality does not arise until raised by some information presented to the military judge in an appropriate motion and that, once presented, the military judge considers the issue de novo like many other issues of law?

Fifth, [**57] should the relative responsibilities of the military judge and the members of the court-martial panel be revisited? As noted above, the present Manual (2000 ed.) provides some guidance in paragraph 14c(2)(a), Part IV, on which types of orders may be considered lawful or unlawful, but provides no guidance on the allocation of duties within the court-martial itself.

RCM 801(e), governing the power of the military judge to rule finally on interlocutory questions and questions of law, provides the following general guidance: first, any ruling on a question of law or interlocutory question is final--RCM 801(e)(1)(A); and second, the military judge decides questions of fact within an interlocutory question under a preponderance-of-the-evidence standard--RCM 801(e)(4). The text of the rule does not address the legality of orders. The non-binding Discussion accompanying RCM 801(e)(5) briefly notes that "the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged ... normally [is a] question[] of law." In short, the Rule is silent and the Discussion contemplates no role for the court members. Regardless whether [**58] it is an issue of law or an issue of fact, the Discussion contemplates that the matter will be resolved by the military judge.

The Military Judges' Benchbook, however, takes a different approach. The non-binding model instructions for Article 92 offenses provide:

When it is clear as a matter of law that the order was lawful, this should be resolved as an interlocutory question ....
***
If there is a factual dispute as to whether or not the order was lawful, that dispute must be resolved by the members in connection with their determination of guilt or innocence. ...
***
If the military judge determines, as a matter of law, that the order was not lawful, [the judge] should dismiss the affected specification ....

Para. 3-29, Military Judges' Benchbook at 3-59 (Dept. of the Army Pamphlet 27-9 (Oct. 1986)). This guidance appears to be inconsistent with RCM 801(e). If the question of lawfulness should continue to be treated as an interlocutory question or a question of law, then under RCM 801(e), it is the responsibility of the military judge -- not the members -- to decide questions of law and any questions of fact arising thereunder.

The Benchbook, [**59] however, clearly reflects a degree of discomfort with the removal of any role for the members in such a case beyond determining whether the order was, in fact, issued and received. Although there have been lower court opinions rejecting defense challenges to the adequacy of instructions following the Benchbook approach, e.g., *United States v. Tiggs, 40 C.M.R. 352 (ABR 1968),* pet. denied, *18 U.S.C.M.A. 630, 39 C.M.R. 293 (1969),* it does not appear that any cases have addressed the relationship between the Manual and the Benchbook in terms of the roles of the members and the military judge.

In contrast to the Manual's focus on the military judge as the decision maker on the issue of legality in disobedience cases, the Manual contemplates a role, albeit somewhat limited, for the members in considering the legality of an order when

raised as a defense to another crime. RCM 916(d), which governs the defense of obedience to orders, provides:

It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful. [**60]

The prosecution has "the burden of proving beyond a reasonable doubt that the defense" of obedience to orders "did not exist." RCM 916(b). The military judge decides as [*114] a matter of law whether the order raised by the defense was lawful. If so, the defense of justification applies and the charge is dismissed. See RCM 916(c). If the military judge rules that the order was unlawful, the judge so instructs the members and the members then decide whether the prosecution has proved beyond a reasonable doubt that the accused actually knew that the order was unlawful or that a person of ordinary sense would have known that the order was unlawful. See *United States v. Calley, 22 U.S.C.M.A. 534, 541-42, 48 C.M.R. 19, 26-27 (1973).*

In view of the role given to the members in assessing the reasonableness of a servicemember's interpretation of the legality of an order when raised as a defense, should they be given a similar role under the Manual in assessing legality in a disobedience case? If so, what role should they be given? Should the guidance in the Benchbook be given stature in the Manual? If so, how should it be reconciled with RCM 801(b), under which the factual components [**61] of an interlocutory issue are resolved by the military judge, not the members?

Underlying these concerns is the question of which issues involving the legality of an order call for the expertise that a blue ribbon court-martial panel brings to the process and which call for the expertise that a military judge brings to the process. As our men and women in uniform are increasingly deployed

to serve as peacekeepers and peace enforcers in challenging circumstances in which traditional rules of engagement are difficult to employ, it is quite possible that these questions will arise in a real, rather than theoretical, situation. It is an area in which a fresh review and possible modification of the guidance in the Manual could be most helpful. To the extent that this guidance would involve procedural matters, the President has the authority to establish authoritative rules in the Manual under Article 36, UCMJ, *10 USC § 836*. To the extent that such guidance would involve interpretation of substantive offenses, it would be binding to the extent that it provided rights greater than those available under the statute. In any case, such guidance would be given considerable [**62] deference.

Although the temptation often is great -- with good justification -- to allow the law to develop through the process of litigating specific cases, this is an area in which many weighty questions affecting the fundamental rights and obligations of servicemembers remain unanswered. In that context, a serious effort to address the questions concerning the process of adjudicating the legality of orders would appear to be in the best interest of our Nation and our men and women in uniform.

SULLIVAN, Judge (concurring in the result):

INDEX

I Overview

II The Political-Question Doctrine Resolves All Claims But One

III General View of the Case

IV General View of the Law

V Trial

VI Lawfulness of Order As Element

VII Lawfulness of Order is Not an Interlocutory Question of Law

VIII Error under Gaudin [*115]

IX Harmless Error under Neder

X Conclusion

I

Overview

Thousands of military orders are given each day in our armed forces as they have been given throughout the history of our great country. Article 92(2), Uniform Code of Military Justice, *10 USC § 892*, legislatively reflects the traditional [**63] Anglo-American view that only the disobedience of "lawful" orders is prohibited. See, e.g., Articles 90(2), 91(2), and 92(1), UCMJ, *10 USC § § 890*(2), 891(2), and 892(1), respectively. Today, the majority characterizes the lawfulness of an order as mere "surplusage" and judicially eliminates it as an essential element of a disobedience offense. ___ MJ at (23 and n.7). I strongly disagree with this radical departure from our political, legal, and military tradition. See *Unger v. Ziemniak, 27 M.J. 349, 358 (CMA 1989).*

The instant case is ultimately about the process due an American servicemember on trial for the crime of disobedience of a lawful order, i.e., how the lawfulness of the disobeyed order is to be determined at a court-martial and whether that procedure is constitutional. See generally *Weiss v. United States, 510 U.S. 163, 176-81, 127 L. Ed. 2d 1, 114 S. Ct. 752*

(1994). Today, the majority opinion holds that the lawfulness of an order was properly decided as "a question of law" by the military judge in this case and cites Article 51(b), UCMJ, *10 USC § 851*(b). I view the lawfulness of an order in a disobedience [**64] case as an element of that offense which in appellant's case presented a justiciable mixed question of fact and law that the members of his court-martial should have decided. See Article 51(c) and *United States v. Gaudin, 515 U.S. 506, 522-23, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)* (elements of a criminal offense which are mixed questions of fact and law must be determined by the jury members).

Finally, modern military legal practice has long provided a procedure for determining the lawfulness of an order in disobedience cases. See para. 3-16-3 n.3, Military Judges' Benchbook (Department of the Army Pamphlet 27-9 (01 April 2001) and (30 Sept. 1996)); see also paras. 3-14-2 n.4; 3-15-2 n.3; 3-16-1, n.3; and 3-16-2 n.4, Benchbook, supra (1996 & 2001 eds.). It is well established that the military judge determines the lawfulness of an order and so instructs the members if no question of fact is raised pertaining to this question. See *Unger v. Ziemniak, supra at 359*. However, if there are questions of fact raised pertaining to the lawfulness of the order violated, the members of the court-martial are required to determine lawfulness as a mixed question of fact and [**65] law. Id. See *United States v. Robinson, 6 U.S.C.M.A. 347, 356, 20 C.M.R. 63, 72 (1955); United States v. Zachery, 6 C.M.R. 833, 837 (AFBR 1952)* (factual questions concerning legality of order to be decided by members). Today, the majority disregards this long-existing military practice and broadly creates a new rule that the military judge finally decides the lawfulness of an order in all cases prosecuted under Article 92. But see *United States v. Ornelas, 1952 CMA LEXIS 461, 2 U.S.C.M.A. 96, 99-101, 6 C.M.R. 96, 99-101 (1952)* and Article 39(a)(1) and (2), UCMJ, *10 USC § 839*(a)(1) & (2); see

generally C. Wright, Federal Practice and Procedure: Criminal 3d § 194 at 366-67 (1999) (pretrial motion raising defenses and objections which implicate trial of general issue should only be decided by jury). I must disagree with this additional departure from established military practice and its application to appellant's case where I conclude questions of fact were raised concerning the lawfulness of the order violated. See generally *United States v. Scheffer, 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998);* see also *United States v. Tualla, 52 M.J. 228, 231 (2000)* [**66] ("adhering to precedent is usually the wise policy" (internal quotation marks omitted)).

The majority's unsettling approach to all these questions is completely unnecessary to [*116] resolve appellant's case. As explained below, appellant had a single justiciable legal claim against his commander's order which was based on a service uniform regulation. The evidence in this case, however, overwhelmingly established that this order did not violate that Army uniform regulation and was otherwise lawful. See *Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999);* see also *Johnson v. United States, 520 U.S. 461, 470, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997).*

II

The Political-Question Doctrine Resolves All of Appellant's Claims But One

My separate opinion in this case is expressly limited to the single claim of appellant that the disobeyed order was unlawful because it violated a U.S. Army Uniform Regulation under the facts of his case. This particular claim is the only claim that raised a contested question of fact. Appellant made other legal claims that the order to wear certain United Nations (UN) accoutrements on his United States Army uniform was unlawful. In these other claims, he particularly [**67] argued that the order was unlawful based on the constitutional

prohibition against involuntary servitude (Amend. XIII), the UN Participation Act, and his enlistment contract. (R. 423) These arguments involved no real factual disputes and pertained to the legality of his deployment order to Macedonia as part of the UN Peacekeeping Force. See also *United States v. Lenox, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).*

It is my view that these particular legal claims (challenges to deployment) are not justiciable issues at a court-martial in a trial for disobedience of orders. See *United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967).* In this regard, I agree with Judge Effron and Senior Judge Everett that these legal arguments were properly rejected by the military judge. The disposition of these claims under the political-question doctrine was a pure question of law for the military judge alone (see *United States v. Austin, 27 M.J. 227, 230, 234 (CMA 1988); United States v. Phillips, 18 U.S.C.M.A. 230, 234, 39 C.M.R. 230, 234 (1969))* and did not legally violate appellant's right to a decision by the factfinders on all the elements of a crime. [**68] See *United States v. Brown, 50 M.J. 262, 265 (1999);* see also *United States v. Bridges, 12 U.S.C.M.A. 96, 99-100, 30 C.M.R. 96, 99-100 (1961)* (decision on what law to apply to determine whether element of crime established is solely question of law for president of court-martial). See generally Article 51(b), UCMJ, *10 USC § 851*(b) (1968) (adding "questions of law" authorization for military judge).

The political-question doctrine, however, cannot be used to resolve appellant's additional claim that the order in question violated the U.S. Army Uniform Regulation. This claim did not require a ruling on the legality of the deployment and raised justiciable questions of fact pertaining to an element of the offense that needed to go to the military jury for resolution. See *United States v. Robinson, supra 6 U.S.C.M.A. at 353-56, 20 C.M.R. at 69-72.* See generally Article 51(c) and *United States v. Gaudin, supra.* On this point I join the wise and thoughtful

opinion of Senior Judge (former Chief Judge) Everett. His resolution of this particular issue is consistent with my view of this issue.

III

General [69] View of the Case**

This is the case of Specialist Michael New, an American soldier in Germany, who was ordered by his U.S. Army superiors to put on a United Nations blue beret and UN insignia on his uniform when his unit was alerted for deployment to Macedonia.[1] He refused this order and was ordered to stand trial for that disobedience at a court-martial. Specialist New chose a trial by a court-martial panel of [*117] members [hereinafter called a "military jury"].[2]

---

[1] Although this case involves a uniform order, the case is far from being simple. Justice Oliver Wendell Holmes, Jr., once said:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Company v. United States, 193 U.S. 197, 400-01, 48 L. Ed. 679, 24 S. Ct. 436 (1904) (Holmes, J., dissenting). The present case may be a great case, but we must be mindful not to bend the cherished principle that properly contested elements of a crime are to be decided by the jury whether it is a civilian or a military jury.

[2] A military accused does not have a right to a trial by jury of his peers as provided in the Sixth Amendment. He does have a right to a trial by his military superiors (see Article 25(d)(1), UCMJ, *10 USC § 825*(d)(1)) who are selected by the convening authority (see Article 25(d)(2)). I have suggested that the Uniform Code of Military Justice be amended to provide for random selection of members. See *United States v. Roland, 50 M.J. 66, 70 (1999)* (Sullivan, J., concurring in the result).

[**71]

At the court-martial of Specialist New, in order to successfully prosecute him, the Government basically needed to prove three facts:

1. that Specialist New received and understood the order to put on the UN Beret and UN insignia;

2. that the order was lawful; and

3. that Specialist New disobeyed the order.

At trial Specialist New did not dispute that the order was given, that he understood it or that he disobeyed it. However he made clear that his intended defense at trial was that the order was unlawful for several different reasons. Thus, his guilt or innocence at trial was to turn largely on the determination by the "military jury" whether the order he disobeyed was lawful or unlawful. As shall be discussed in detail below, his judge instructed the "military jury" before they deliberated that the

---

Nevertheless, court-martial panel members in a functional sense are commonly referred to as a military jury. See F. Gilligan and F. Lederer, 2 Court-Martial Procedure § 15-11.00 at 3-4 (1999) ("As a consequence, as long as a military judge is present, court members are merely military jurors lacking any powers that would be considered unique in the civilian world." (Footnote omitted; emphasis added); D. Schlueter, Military Criminal Justice: Practice and Procedure § 15-2(e) at 635 (5th ed. 1999) ("The court members comprise the military's counterpart of the civilian jury."); H. Moyer, Justice and the Military § 2-602 at 529 (1972) ("As with civilian juries, military court members vote on the findings of guilty or innocence."). This Court has also held that certain due process requirements pertaining to civilian juries are applicable to military courts of members even though the military accused has no Sixth Amendment right to trial by jury. See *United States v. Witham, 47 M.J. 297, 300-03 (1997); United States v. Tulloch, 47 M.J. 283, 285 (1997).*

order was lawful. Thus, the issue of Specialist New's guilt was, in effect, determined by the judge in his instructions, rather than by the "military jury" in its deliberations. In my view, this was an error under established military procedure and as a matter of constitutional due process.

IV

General View of the Law

As a cadet at West Point[3] [**72] and as a soldier, I was taught that (i) all lawful orders in the U.S. Army were to be obeyed; and (ii) however, if you believed that an order was unlawful, you could disobey it but you would risk a court-martial where a "military jury" would either validate or reject your decision to disobey. See J. Snedeker, Military Justice under the Uniform Code 593, 599 (1953); W. Winthrop, Military Law and Precedents 575-76 (2d ed. 1920 Reprint); W. De Hart, Observations on Military Law and the Constitution and Practice of Courts-Martial, 165-66 (1846).

[**73]

Colonel Winthrop stated the following regarding a soldier's decision to disobey an order he thought was unlawful:

"**Lawful command**." The word "lawful" is indeed surplusage, and would have been implied from the word "command" alone, but, being used, it goes to point the

---

[3] Every cadet takes the following oath when he enters the United States Military Academy at West Point, New York:

I, (full name), do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State or country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the Uniform Code of Military Justice." *10 USC § 4346* (emphasis added).

conclusion affirmed by all the authorities that a command not lawful may be disobeyed, [*118] no matter from what source it proceeds. But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land. The unlawfulness of the command must be a fact, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors, the onus of establishing this fact will, in all cases-except where the order is palpably illegal upon its face-devolve upon the defence, and clear and convincing evidence will be required to rebut the presumption.

The legality of the order may depend upon the period, whether one of peace or war, (or other emergency,) at which it is issued. [**74] An order which would be unlawful in peace or in the absence of any public exigency, may be perfectly lawful in war as being justified by the usages of civilized warfare. Thus an order for the seizure of citizens' property for the subsistence or transportation of the troops, the construction of defences, &c., or for its destruction to facilitate the operations of the army in the field, or to prevent its falling into the hands of the enemy, would be not only authorized, but to disobey it would be a grave military crime. But, in general, in time of peace an order similarly in disregard or private right would be repugnant to the first principles of law, and to fail to obey it would constitute no violation of the present Article.

But while a military inferior may be justified in not obeying an order as being unlawful, he will always assume to do so on his own personal responsibility and at his own risk. Even where there may seem to be ample warrant for his act, he will, in justifying, commonly be at a very considerable disadvantage, the presumption being, as a rule, in favor of the legality of the order as an executive mandate, and the facts of the case and

reasons for the action [**75] being often unknown in part at least to himself and in the possession only of the superior. In the great majority of cases therefore it is found both safer and wiser for the inferior, instead of resisting an apparently arbitrary authority, to accept the alternative or obeying even to his own detriment, thus also placing himself in the most favorable position for obtaining redress in the future. On other hand, should injury to a third person, or damage to the United States, result from the execution of an order by a subordinate, the plea that he acted simply in obedience tot he mandate of his proper superior will be favored at military law, and a court-martial will almost invariably justify and protect an accused who has been exposed to prosecution by reason of his unquestioning fidelity to duty, holding the superior alone responsible. How far he will be protected by the civil tribunals, if sued or prosecuted on account of a cause of action or offence involved in his proceeding, will be considered [elsewhere].

Winthrop, supra at 575-76 (most emphasis added; footnotes omitted).

It is also my view today that a military accused has a codal and constitutional right to [**76] have the members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense of which he is charged. See Article 51(c), UCMJ, *10 USC § 851*(c), and *United States v. Glover, 50 M.J. 476 (1999); United States v. Brown, 50 M.J. at 265; United States v. Mance, 26 M.J. 244, 254 (CMA 1988)* (duty of military judge to instruct members on all elements of the offense). See also *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310;* see generally *Weiss v. United States, 510 U.S. at 177-78* (recognizing Fifth Amendment due process standard for measuring court-martial procedures).

V

Appellant's Trial

Appellant was charged and found guilty of failure to obey a lawful order in violation of Article 92(2), UCMJ. The specification he was found guilty of states:

SPECIFICATION: In that Specialist Michael G. New, US Army, having knowledge [*119] of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, [**77] i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same.

(Emphasis added.)

In a pretrial session under Article 39(a), UCMJ, *10 USC § 839*(a), the military judge addressed a series of government and defense motions, including motions to dismiss which he denied. Then, the judge held as a matter of law that the uniform order given to appellant was lawful and that the members of the jury would be so instructed with regard to their deliberations on his guilt of disobeying that order. (R. 285, 376) Defense counsel strongly objected to both these rulings. (R. 423-433, 448-49)

Appellant had raised several claims that the order to attach UN accoutrements (i.e., patches and cap) to his U.S. Army uniform was unlawful. As noted earlier, these arguments pertain to the legality of appellant's deployment and are not justiciable issues under our case law. See *United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967).* I agree with Judge Effron and Senior Judge Everett that appellant's claims that the order was illegal on these bases were properly rejected

[**78] by the judge as a matter of law ("political-question doctrine"). See United States v. Johnson, supra.

A remaining argument, however, that the defense asserted at trial was that the order in question, i.e., to wear the UN patches and cap, violated a Department of the Army Regulation, i.e., Army Regulation (AR) 670-1, Wear and Appearance of Army Uniforms and Insignia (1 September 1992). It pointed to paragraph 3-4, which stated:

Insignia and accouterments authorized for wear with these uniforms are *** (k) Foreign badges, distinctive unit insignia, and regiment distinctive insignia will not be worn on these uniforms.

(Emphasis added.)

Both the military judge and the Court of Criminal Appeals found that this regulation did not invalidate the disobeyed order in this case because paragraphs 1-18 and 2-6d of the same regulation permitted these uniform additions.

Paragraph 1-18 provides:

Wearing of organizational protective or reflective clothing.

Commanders may require the wear of organizational protective or reflective items or other occupational health or safety equipment with the uniform when safety considerations [**79] make it appropriate. These items will be furnished at no cost to the individual.

(Emphasis added.)

Paragraph 2-6d provides:

The commander in charge of units of maneuver may prescribe the uniform to be worn within the maneuver area.

(Emphasis added.)

Both the judge at trial and the Court of Criminal Appeals found as fact that the disobeyed order was issued for "safety" purposes and while on "maneuver." (R. 426, 428) (R. 443-44 & 449)

The military judge then made a ruling that the order given to appellant was a lawful order. See R. 431. Later, prior to trial counsel's and defense counsel's arguments on findings, the military judge gave the members the following instructions on findings:

In order to find the accused guilty of this [disobedience] offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements: One, that a member of the armed forces, namely, Lieutenant Colonel Stephen R. Layfield, on 2 October 1995; and Captain Roger H. Palmateer, on 4 October 1995, issued a certain lawful order to wear the prescribed uniform for the deployment to Macedonia, i.e., UN patches and [**80] cap;
***
Members of the court, as a matter of law, the order in this case, as described in the [*120] specification--if, in fact, there was such an order--was a lawful order.
***
You should consider, along with all the evidence in this case, the following: I previously instructed you that, as a matter of law, the order in this case, as described in the specification--if, in fact, there was such an order--was a lawful order. I further instruct you at this time that, as a matter of law, the accused would not have violated AR 670-1 by obeying the order in this

BEST AVAILABLE COPY

case as described in the specification, if, in fact, there was such an order.

(R. 782-84 (emphasis added)).

After the arguments on findings, the military judge again instructed the members on the findings in the following manner:

I have judicially noticed that AR 670-1 is a lawful regulation [and] that the accused had a duty to obey that regulation.
***
You should consider, along with all the evidence in this case, the following:

I previously instructed you that, as a matter of law, the order in this case, as described in the specification--if, in fact, there was such an [**81] order--was a lawful order. I further instruct you at this time that, as a matter of law, the accused would not have violated AR 670-1 by obeying the order in this case, as described in the specification, if, in fact, there was such an order.

(R. 829-30 (emphasis added)).

VI

Lawfulness Of Order As Element Of The Offense

The first question I will particularly address is whether the lawfulness of the order allegedly violated in this case is an element of the offense of disobedience of an order under Article 92(2), UCMJ. This criminal statute states:

§ 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who--

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

(Emphasis added.)

I conclude for several reasons that the lawfulness of the order allegedly violated in this case (the order to wear UN patches and cap) was an [**82] element of the charged offense and, accordingly, under Article 51(c), UCMJ, and *United States v. Gaudin, 515 U.S. at 522-23,* should have been presented to the "military jury."[4]

[**83]

First, I note that Article 92, UCMJ, as well as other codal provisions noted above, expressly prohibit failure to obey a "lawful" order, language recognizing the historical and political

---

[4] The majority's citations to *Cox v. United States, 332 U.S. 442, 453, 92 L. Ed. 59, 68 S. Ct. 115 (1947),* and *Yakus v. United States, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944),* do not support its contrary position in this case. In Cox, the legality of the classification which was alleged to have violated the applicable regulation was not an element of the charged criminal offense. In Yakus, Congress expressly provided that a person could be prosecuted for violating certain regulations or regulatory decisions without regard to the validity of such a regulation unless the accused previously challenged them in an appropriate civil proceeding or exhausted his administrative remedies. Cf. Article 96, UCMJ, *10 USC § 896* (prohibiting releasing prisoner without authority "whether or not the prisoner was committed in strict compliance with law.").

importance of requiring servicemembers to obey only lawful orders. See G. Davis, A Treatise on the Military Law of the United States 378-82 (1913 3d ed. rev.); C. Clode, The Administration of Justice Under Military and Martial Law 30-31 (2nd ed. 1874); Winthrop, Military Law and Precedents 575 (2nd ed. 1920 Reprint). See generally *United States v. Gentle, 16 U.S.C.M.A. 437, 441,* [*121] *37 C.M.R. 57, 61 (1966); United States v. Milldebrandt, 8 U.S.C.M.A. 635, 639, 25 C.M.R. 139, 143 (1958)* (Quinn, C.J., concurring in the result) (American servicemembers "are neither puppets nor robots").

Second, I note that the President in the Manual for Courts-Martial, United States, has repeatedly identified the lawfulness of the order as an element of this offense.[5] See paras. 16b(2)(a) and 16c(1)(c), Part IV, Manual for Courts-Martial, United States (1995 ed.) ("That a member of the armed forces issued a certain lawful order"). See also para. 16(b)(2)(a), Manual, supra [**84] (1994 ed.); para. 16a(1) and c(1)(C), Manual, supra (1984 ed.); para. 171b, Manual for Courts-Martial, United States, 1969 (Revised Edition); para. 171b, Manual for Courts-Martial, United States, 1951.

Third, this Court, in an opinion authored by then-Chief Judge Everett, unanimously stated that "in a prosecution for disobedience, lawfulness of the command [**85] is an element of the offense." *Unger v. Ziemniak, 27 M.J. 349, 358 (1989).*

---

[5] This was a change from previous Army Manuals which did not expressly describe lawfulness as an element of the offense of disobedience of orders but simply noted commands can be presumed lawful in its explanation of the elements of this offense. *Paras. 152*b and 153b, Manual for Courts-Martial, U.S. Army, 1949; paras. 134b and 135b, Manual for Courts-Martial, U.S. Army, 1928; paras. 415 and 416, Manual for Courts-Martial, U.S. Army, 1917. See *United States v. Trani, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 295, 3 C.M.R. 27, 29 (1952)* (discussing Article of War (AW) 64 and paragraph 152b, Manual for Courts-Martial, U.S. Army, 1949.

See Articles 90(2), 91(2), and 92(1) and (2), UCMJ; *United States v. Martin, 1952 CMA LEXIS 591, 1 U.S.C.M.A. 674, 676, 5 C.M.R. 102, 104 (1952); United States v. Young, 1 M.J. 433, 437 (CMA 1976).* See *United States v. Trani, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 295, 3 C.M.R. 27, 29 (1952);* see also *United States v. Hill, 5 C.M.R. 665, 669 (AFBR 1953)* (presumption of lawfulness in Manual is "tantamount to saying that the lawfulness of the regulation was an element of the offense").

Fourth, military law commentators over many years have consistently stated that lawfulness of an order in disobedience case is an essential element of this offense or those related thereto. See J. Snedeker, Military Justice under the Uniform Code § § 2902-03 at 593-94, 597-99; Davis, supra at 380-81; cf. Winthrop, supra at 575-76 (suggesting it may be a statutory defense).

Finally, the majority opinion asserts that the lawfulness language in Article 92(2) is mere "surplusage" and that the word "lawful" simply reinforces the nature of the order without establishing a separate [**86] and distinct element of the offense.[6] ___ MJ at (23) and n.7. For this proposition it cites Winthrop, supra at 575, who there states:

The word "lawful" [in AW 21] is indeed surplusage, and would have been implied from the word "command" alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command not lawful may be disobeyed, no matter from what source it proceeds.

---

[6] The majority cannot have it both ways. If the lawfulness of an order is surplusage and implied in the element of an order, the members would still be required to decide lawfulness as part of their findings on the order element of the offense. See para. 16b(2)(a), Part IV, Manual, supra (1995 ed.).

(Most emphasis added (footnote omitted.))

This quote from the "Blackstone of Military Law" (see *Reid v. Covert, 354 U.S. 1, 19 n.38, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957)* (plurality opinion)) provides relevant background for interpreting Article 92(2) and determining its essential elements. [**87] See *Staples v. United States, 511 U.S. 600, 619, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994).* Winthrop clearly recognized that if the statutory word "lawful" is used in the disobedience context, it has meaning in terms of the type of military order whose disobedience is punishable at a court-martial. It also shows that Congress could have enacted a statute prohibiting disobedience of orders without regard for the order's lawfulness but chose not to do so. See Article 97, UCMJ, *10 USC § 897* ("except as provided by law"); cf. Article 95, UCMJ, *10 USC § 895* (arrest, custody, confinement); Article 96 ("whether or not the prisoner was committed in strict compliance with law"). Finally, his quotation clearly reflects the traditional Anglo-American view [*122] that a servicemember may not be punished at a court-martial for disobeying all orders of whatever mature issued by a competent superior authority. In these circumstances, I disagree with my fellow Judges that Congress did not intend the lawfulness of the order violated to be an essential element of this criminal offense. See *Unger v. Ziemniak, supra at 358.*

VII

Lawfulness of Order [88] is Not an Interlocutory Question or Question Of Law**

The Court of Criminal Appeals held that the question whether a disobeyed order was lawful in this disobedience prosecution was "an interlocutory question." *50 M.J. 729, 738 (1999).* An interlocutory question, however, is generally understood to be one that "does not bear on the ultimate merits of the case." See *United States v. Ornelas, 2 U.S.C.M.A. at 100, 6 C.M.R. at 100.*

Moreover, we have expressly held that a question is not interlocutory where it is "concerned with disputed questions of fact regarding a matter which would bar or be a complete defense to the prosecution." *United States v. Berry, 6 U.S.C.M.A. 609, 613, 20 C.M.R. 325, 329 (1956).* Since a servicemember may not legally be found guilty of violating an unlawful order (see Winthrop, supra, and *Unger v. Ziemniak, supra)* and questions of fact were raised in this case concerning the lawfulness of the order, it cannot logically or legally be considered an interlocutory question within the meaning of Article 51(b).

The majority of this Court further contends the lawfulness of an order is a "question of law" [**89] which must be decided by the military judge. See *United States v. Carson, 15 U.S.C.M.A. 407, 408, 35 C.M.R. 379, 380 (1965).*[7] We have generally held that a question of law is one where no facts are at issue and only a "legal effect" need be determined. *United States v. Ware, 1 M.J. 282, 284 n.4 (1976); United States v. Bielecki, 21 U.S.C.M.A. 450, 454, 45 C.M.R. 224, 228 (1972);* see *United States v. Boehm, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).* None of those cases, however, approved judicial determinations on elements of an offense, nor has the dicta of this Court in Carson ever been reconciled with the decision of the Supreme Court in *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310.* Cf. *Dennis v. United States, 341 U.S. 494, 511-15, 95 L. Ed. 1137, 71 S. Ct. 857 (1951)* (plurality opinion) (holding that pretrial motion challenging constitutionality of criminal statute on First Amendment grounds was question of law for judge); *United States v. Viefhaus, 168 F.3d 392, 396-97* (10th Cir.) (distinguishing

---

[7] Para. 57b, Manual for Courts-Martial, United States, 1969 (Revised Edition) (no longer in effect) did say, based on Carson, that the lawfulness of orders is "customarily" a question of law.

Dennis, as not involving element of offense), cert. denied, *527 U.S. 1040, 144 L. Ed. 2d 801, 119 S. Ct. 2402 (1999).* Moreover, there are [**90] facts at issue in this case which had to be resolved before the lawfulness of the order under the uniform regulation could be decided. See *United States v. Robinson, 6 U.S.C.M.A. at 355, 20 C.M.R. at 71.*

The majority's position that the lawfulness of an order in a disobedience prosecution is "a question of law," not to be decided by the members, is based on language in this Court's opinion in *United States v. Carson, supra 15 U.S.C.M.A. at 408, 35 C.M.R. at 380.* The majority concedes this statement in Carson was dicta. ___ MJ at (13). Moreover, it recognizes that the dicta in Carson is inconsistent with subsequent pronouncements of this Court in *Unger v. Ziemniak, 27 M.J. 349.* In addition, I note the Supreme Court in Gaudin expressly rejected the notion that members of [**91] a jury were incompetent to decide mixed questions of law and fact, the lynchpin of the Carson dicta noted above. See *United States v. Gaudin, supra 515 U.S. at 521;* cf. *United States v. Carson, supra 15 U.S.C.M.A. at 408-09, 35 C.M.R. at 380-81.* Accordingly, Carson is not persuasive authority for holding that the lawfulness of an order in a disobedience prosecution is a question of law for the military judge.

There is another reason why I disagree with the majority's holding that lawfulness of an order in a disobedience prosecution is a [*123] question of law for the military judge under Article 51(b). Article 51(b) does not delineate what a "question of law" is for purposes of final decision by a military judge. Other provisions of the Uniform Code of Military Justice, however, do indicate Congress' intent in this regard. In Article 51(c), Congress clearly recognized that members of a court-martial must decide whether the elements of an offense are proved by the Government beyond a reasonable doubt. Moreover, in Article 39(a)(1) and (2), UCMJ, *10 USC §*

839(a)(1) & (2), Congress implicitly recognized that "motions raising defenses or objections [**92] which are [not] capable of determination without trial of the issues raised by a plea of not guilty" are a "matter ... appropriate for later consideration or decision by the members of the court."

In this codal context, it is clear that a "question of law" for purposes of Article 51(b) does not include elements of an offense which raise mixed questions of fact and law (e.g., *United States v. Gaudin, supra)* or pretrial motions which raise questions of fact "intermeshed with questions on the merits of a case" (*United States v. Medina, 90 F.3d 459, 463-64 (11th Cir. 1996);* see *United States v. Grimmett, 150 F.3d 958, 962 (8th Cir. 1998)).* To the extent that dicta in Carson suggests the contrary, it should be ignored. Accordingly, whether lawfulness of an order is an element of an offense or simply "an important issue" or an indiscrete element of the offense as suggested by the majority, it was not "a question of law" to be finally ruled on by the military judge under Article 51(b). See also *United States v. Wallace, 2 U.S.C.M.A. 595, 598-99, 10 C.M.R. 93, 96-97 (1953)*(similarly sending to jury question of [**93] knowledge of order under Article 90(2)).

In my view, Article 51(c) requires the military judge to instruct the members on the law pertaining to the elements of a charged offense. See *United States v. Brown, 50 M.J. at 265.* The content of these instructions are questions of law for the military judge. *United States v. Bridges, 12 U.S.C.M.A. at 99-100, 30 C.M.R. at 99-100;* see generally Article 51(b), UCMJ, and 114 Cong. Rec. 29401 (1968). The ultimate decision, however, on an element of the crime which is a mixed question of fact and law is a matter for the members' determination under Article 51(c), and Gaudin.

VIII

Error Under United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)

Having concluded that the lawfulness of the order violated is an element of the offense of disobedience of orders under Article 92(2), it is necessary to determine whether the military judge erred in withdrawing that question from the members' consideration. The Supreme Court in Gaudin addressed a similar question where a federal district court judge refused to submit to the jury the question of the materiality of a fact contained in a false statement [**94] allegedly made in violation of *10 USC § 1001. 515 U.S. at 507.* The question before the Supreme Court was whether the accused "was entitled to have this element of the crime determined by the jury." *515 U.S. at 509.*

In Gaudin, a case remarkably similar in concept to the instant case, a real estate broker was charged with making several false material statements on different federal loan documents in violation of *18 USC § 1001.* Two counts charged him with "knowingly inflating the appraised value of the mortgaged property" and one count with falsely stating that the buyer paid some closing costs. The prosecution offered testimony of several government officials "who explained why the requested information" on the form "was important." The Supreme Court noted what happened next:

At the close of the evidence, the United States District Court for the District of Montana instructed the jury that, to convict respondent, the Government was required to prove, inter alia, that the alleged false statements were material to the activities and decisions of HUD. But, the court further instructed, "the issue [**95] of materiality ... is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed [*124] that the statements

charged in the indictment are material statements." App. 24, 29. The jury convicted respondent of the § 1001 charges.

515 U.S. at 508-09 (emphasis added). The Ninth Circuit, sitting in panel and later en banc, reversed because case law required that the issue of materiality in a § 1001 prosecution be decided by the jury. The Supreme Court affirmed the Ninth Circuit by 9-0 vote.

The Supreme Court in Gaudin recognized the basic constitutional right of a criminal defendant "to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *515 U.S. at 522-23* (emphasis added). It traced this right directly to the Fifth Amendment of the United States Constitution. It said:

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial [**96] jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt *Sullivan v. Louisiana, 508 U.S. 275, 277-278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993)*. The right to have a jury make the ultimate determination of guilty has an impressive pedigree. Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendants] equals and neighbors ...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury" guaranteed by the Constitution was [**2314] "generally understood to mean ... a trial by a jury of twelve men, impartially selected,

who must unanimously concur in the guilt of the accused before a legal conviction can be had." 2 J. Story, Commentaries on the Constitution of the United States 541, n.2(4th ed. 1873) (emphasis added and deleted). This right was designed [**97] "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." Id., at 540-41. See also *Duncan v. Louisiana, 391 U.S. 145, 151-154, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)* (tracing the history of trial by jury).

515 U.S. at 509-11 (most emphasis added; footnotes omitted).

In *Gaudin, supra,* the Supreme Court ruled against the Government's argument that "materiality" was a legal question, not a factual question, and therefore, should be decided by the trial judge alone. The majority today, however, with a familiar echo to the losing government position in Gaudin, holds that the lawfulness of an order is a "question of law" for the judge alone under Article 51(b), UCMJ.[8]

[**98]

The Supreme Court, however, rejected this type of thinking in Gaudin when it said:

Other reasoning in *Sinclair, [279 U.S. 263 (1929),]* not yet repudiated, we repudiate now. It said that the question of pertinency "may be likened to those concerning relevancy at the trial of issues in court," which "is uniformly held [to be] a

---

[8] The majority's position in this case also cannot be squared with numerous decisions of this Court after Carson which hold that the question of an accused's military status (in personam jurisdiction) must also be submitted to the members if military status is an element of the offense. See *United States v. McGinnis, 15 M.J. 345 (1983); United States v. Marsh, 15 M.J. 252 (1983); United States v. McDonagh, 14 M.J. 415 (1983); United States v. Laws, 11 M.J. 475, 476 (CMA 1981)* (opinion of Cook, J.).

question of law" for the court. *279 U.S. at 298.* But how relevancy is treated for purposes of determining the admissibility of evidence says nothing about how relevancy should be treated when (like "pertinence" or "materiality") it is made an element of a criminal [*125] offense. It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another. The question of probable cause to conduct a search, for example, is resolved by the judge when it arises in the context of a motion to suppress evidence obtained in the search; but by the jury when it is one of the elements of the crime of depriving a person of constitutional rights under color of law, see *18 USC § § 241-42.* Cf. *United States v. McQueeney, 674 F.2d 109, 114 (CA1 1982);* [**99] *United States v. Barker, 178 U.S. App. D.C. 174, 546 F.2d 940, 947 (CADC 1976).*[9]

515 U.S. at 520-21 (emphasis added).

Admittedly, this Court's opinion 35 years ago in *United States v. Carson, 15 U.S.C.M.A. at 408, 35 C.M.R. at 380;* might be viewed as counter [**100] to Gaudin. Carson suggests in dicta that a law officer, not a court of members, must decide whether a disobeyed order was lawful in a disobedience-of-orders case. However, Carson was decided thirty years before Gaudin and its dicta rests largely on civilian authorities overturned or limited by the Gaudin decision. See

---

[9] Article 51(b), UCMJ, *10 USC § 851*(b), addresses the proper procedure for handling "all questions of law and all interlocutory questions arising during the proceedings ...." Article 51(c), however, addresses the proper procedure for handling "the elements of the offense ...." Avoiding a constitutional problem (see *Weiss v. United States, 510 U.S. 163, 176-81, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1994)*), I would construe these provisions in accordance with *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1996),* and recognize that "it is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another." *Id. at 521.*

United States v. Ornelas, 2 U.S.C.M.A. at 100, 6 C.M.R. at 100. See also *Dennis v. United States, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857.* Moreover, in a subsequent case, this Court more narrowly applied the Carson dicta to the particular situation where a law officer construed a regulation as inapplicable as a matter of law to the order violated. See *United States v. Phillips, 18 U.S.C.M.A. at 234-35, 39 C.M.R. at 234-35.* See also *United States v. Austin, 27 M.J. at 230-31.*

In any event, where a regulation is found applicable as a matter of law to a disobeyed order but its violation is at issue, we have held, consistent with Gaudin, that this question must be sent to the members to resolve depending on the facts and circumstances of a particular case. See *United States v. Smith, 21 U.S.C.M.A. 231, 235, 45 C.M.R. 5, 9 (1972);* [**101] *United States v. Robinson, 6 U.S.C.M.A. at 356, 20 C.M.R. at 72.* See also *United States v. Carson, supra 15 U.S.C.M.A. at 409, 35 C.M.R. at 381; United States v. Gray, 6 U.S.C.M.A. 615, 618-20, 20 C.M.R. 331, 334-36 (1956); United States v. Phillips, supra at 235, 39 C.M.R. at 235; United States v. Ornelas, supra 2 U.S.C.M.A. at 101, 6 C.M.R. at 101.*[10]

---

[10] The majority suggests a different practice based on dicta in *United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965),* and its gloss of the discussion to various Rules for Court-Martial. (___ MJ at 14-15) I disagree for several reasons. First, the Military Judges' Guide (now the Benchbook) for some 30 years has expressly recognized and followed this approach. See para. 4-29, Military Judges' Guide (Dept. of the Army Pamphlet 27-9 (1969)). Second, *United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965),* and paragraph 57b, Manual for Courts-Martial, United States, 1969 (Revised Edition), cited by the majority, actually recognized and approved the Ornelas procedure. Third, although the President promulgated paragraph 57b, 1969 Manual, supra, this provision did not exist prior to 1969 and was omitted in the binding provisions of all versions of the Manual starting in 1984. Fourth, the Manual for Courts-Martial makes it quite clear that the Discussion [see ___ MJ at (14)] is not an enforceable part of the Manual. Para. 4, Discussion, Part I, Preamble.

[**102]

It must be recognized that Gaudin definitively explained a jury's responsibility to decide all the elements of a charged offense. [*126] See *United States v. Swindall, 107 F.3d 831, 835 (11th Cir. 1997).* Some circuits have subsequently attempted to distinguish Gaudin where the question withheld from the jury constitutes a pure question of statutory construction. See *United States v. Credit, 95 F.3d 362, 364 (5th Cir. 1996),* cert. denied, *519 U.S. 1138, 136 L. Ed. 2d 886, 117 S. Ct. 1008 (1997); United States v. Amparo, 68 F.3d 1222, 1225 (9th Cir. 1995).* However, in appellant's case, the military judge and the Court of Criminal Appeals found as fact that appellant's unit was on maneuvers and that safety conditions arising from the deployment of appellant's unit to Macedonia warranted the wearing of the United Nations badges and accoutrements. Accordingly, the post-Gaudin decisions on elements raising pure questions of law are not relevant here.

Even if the trial judge correctly decided appellant's challenge based on AR 670-1 as a pure question of law, error under Gaudin still occurred in this case.[11] The military judge

---

Finally, the Discussion of RCM 801(e)(5) only provides that the legality of orders may be questions of fact; it does not say who decides these questions of fact. Accordingly, this is not a case asking whether a certain longstanding military procedure is constitutional as presented in *Weiss v. United States, 510 U.S. at 176-81,* but instead is a case where this appellate court institutes a new military procedure inconsistent with that longstanding practice; see *United States v. Scheffer, 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998).*

[11] Appellant's additional arguments are that the UN-patches-and-cap order violated the constitutional prohibition against involuntary servitude (Amend. XIII), the UN Participation Act, and his enlistment contract. These arguments pertain to the legality of his unit's deployment order to Macedonia as part of the UN Peacekeeping Force, not the legality of the order to wear the UN accoutrements in Germany prior to that deployment.

might have concluded [**103] that appellant's regulatory challenge was not applicable to the order disobeyed in this case (see *United States v. Phillips, supra)* or that the regulation conferred no right on appellant to disobey his commander's order (see *United States v. Hangsleben, 8 U.S.C.M.A. 320, 322-23, 24 C.M.R. 130, 132-33 (1957)).* Nevertheless, he was still required to instruct the members that they must determine the lawfulness of the violated order in this case in general without regard to appellant's legally rejected claims of unlawfulness (i.e., the general-inference-of-lawfulness question). See Article 51(c) and paras. 14 and 16, Part IV, Manual, supra (1995 ed.). Error under Gaudin occurred on this basis as well.

[**104]

IX

Harmless Error under *Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999)*

Having concluded that the military judge erred in removing the question of the lawfulness of order allegedly violated in this case from the members' consideration, a question of prejudice remains. See *Neder v. United States, supra at 4.* In Neder, the Supreme Court held that a federal district court's refusal to submit the materiality element of offenses under the federal tax, mail, wire, and bank-fraud statutes was subject to harmless-error analysis. *Id. at 4.* It further held such error as to the tax fraud was harmless in Neder's case because based on the whole record it concluded "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id. at 15.*

See *United States v. Lenox, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).*

The Supreme Court in Neder clearly delineated the harmless-error inquiry required for the type of error we have in the instant case, as follows:

We believe that where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between "society's interest in punishing the guilty [and] the method [**105] by which decisions of guilt are to be made." *Connecticut v. Johnson, 460 U.S. [73] at 86, [103 S. Ct. 969, 74 L. Ed. 2d 823 (1983)]* (plurality opinion). The harmless-error doctrine, we have said, "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, ... and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." [Delaware v.] Van Arsdall, supra, [475 U.S.] at 681, [*106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)]*. At the same time, we have recognized that trial by jury in serious criminal cases "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Gaudin, 515 U.S. at 510-511* (quoting 2 J. Story, Commentaries on the Constitution of the United [*127] States 540-541 (4th ed. 1873)). In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the [**106] jury trial guarantee.

Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised

evidence sufficient to support a contrary finding -- it should not find the error harmless.

527 U.S. at 18-19 (emphasis added).

Turning to the present case, the Government was required to prove to the members the essential elements of the offense of disobedience of orders, including the lawfulness of the order to wear the UN patches and cap. See *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310,* and Article 51(c), UCMJ. In this regard, it normally would be entitled to rely on an inference of lawfulness provided by the President in paragraph 14c(2)(a)(i), Part IV, 1984 Manual, supra (1995 ed.). However, the defense evidenced paragraph 3-4(k), AR 670-1 (1 Sept. 1992), and paragraph 113, Part IV, Manual, supra (1995 ed.) (wearing unauthorized insignia as offense under [**107] Article 134). The former provided that "foreign badges, distinctive unit insignia and regiment distinctive insignia will not be worn on these uniforms [BDUs]." The latter prohibited the unauthorized wearing of "insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform," in violation of Article 134.

This is some evidence that appellant's order to wear UN badges was "patently illegal" because it "directed the commission of a crime." Para. 14c(2)(a)(i), Manual, supra (1995 ed.); see Article 92(1) (Disobedience of a Lawful General Regulation). See also *United States v. White, 17 U.S.C.M.A. 211, 214, 38 C.M.R. 9, 12 (1967)* (evidence of violated regulation sufficient to offset presumption confinement lawful); cf. *United States v. Wartsbaugh, 21 U.S.C.M.A. 535, 540, 45 C.M.R. 309, 314 (1972)* (where no evidence order violated regulation, defense evidence insufficient to rebut presumption of lawfulness of order). In these circumstances, the Manual for Courts-Martial generally provides that the Government must prove the lawfulness of the disobeyed order without benefit of the inference of lawfulness,

and it was required to [**108] affirmatively show that the order did not violate paragraph 3-4(k), AR 670-1; see *United States v. Wartsbaugh, supra.* As noted above, paragraph 1-18 permits a commander to "require the wearing of organizational protective or reflective items or other occupational health or safety equipment with the uniform when safety considerations make it appropriate." (Emphasis added.) Moreover, paragraph 2-6d provides that "the commander in charge of units on maneuver may prescribe the uniform to be worn within the maneuver area." (Emphasis added.) Accordingly, the prosecution could easily meet its burden by proving as fact to the members that the wearing of the UN badges and cap was otherwise authorized by an authority superior to that issuing the U.S. Army Uniform Regulation (Department of the Army) or that the above-cited sections of the uniform regulation authorized the wearing of the UN accoutrements.

As noted earlier in this opinion, it was uncontroverted in appellant's case that he was ordered to wear the UN badges and cap pertinent to the official deployment of his unit to Macedonia as part of a peacekeeping mission. (R. 581) Its mission was "to observe, [**109] monitor, and report along the Macedonian and Serbian border." (R. 581) It was also uncontroverted that the order to wear these badges was given by his commanders as part of the operations plans for the mission and for safety purposes. (R. 710; 667). Finally, although the defense asserted that there were questions of fact to decide in this case, it proffered no evidence that the safety conditions in Macedonia did not make the [*128] wearing of these badges appropriate or that this deployment was not a maneuver within the meaning of AR 670-1. See *United States v. Wartsbaugh, supra at 540, 45 C.M.R. at 314; United States v. Smith, 21 U.S.C.M.A. at 234-35, 45 C.M.R. at 8-9.* Accordingly, there was no real contest in this case on the lawfulness of this order in terms of this regulation, and

appellant was not prejudiced by the failure of the military judge to instruct on this element of the offense. See also *Johnson v. United States, 520 U.S. at 470.*

X

Conclusion

In sum, I conclude that the military judge erred in withdrawing from the members' consideration an element of the charged offense of disobedience of orders, i.e., the lawfulness [**110] of the order disobeyed. See generally *United States v. Gaudin, supra.* See *Unger v. Ziemnick, 27 M.J. at 358; United States v. Robinson, 6 U.S.C.M.A. 347, 20 C.M.R. 63.* However, this error in my view was harmless beyond a reasonable doubt in this case. See *Neder v. United States, supra.* There was overwhelming evidence presented in this case, uncontroverted by the defense, that the order to wear the UN patches and cap was lawful, i.e., it was properly authorized, related to a military duty, and violated no applicable service uniform regulations. See generally para. 16c(1)(a) and (c), Part IV, Manual, supra (1995 ed.). Accordingly, I join my colleagues in affirming appellant's conviction in this case.

In reaching this legal decision, I am not unmindful of the concept of military duty. When one takes a broad view of the factual context and circumstances of the order Specialist New was given, it is clear that he had a duty to obey it. Specialist New was being sent in harm's way at the command of his Nation. The wearing of UN insignia and headgear would only help him and his fellow soldiers to more [**111] safely perform their peacekeeping mission to Macedonia. New had a duty to his unit a duty to help his unit accomplish its mission with the least risk of loss of life. I am reminded of a passage of Justice Oliver Wendell Holmes, Jr., in an address to the Harvard Graduating Class of 1895. The speech was entitled,

"The Soldier's Faith," and it clearly reflected the views of a Judge who in his youth had seen war as a soldier:

In the midst of doubt, in the collapse of creeds, there is one thing I do not doubt ... and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.

"The Soldier's Faith," May 30, 1895, in Holmes, Speeches 56,59 (1913).

Although I have found legal error in this case, I find that the error in the context of this case was harmless beyond a reasonable doubt, and I see no reason to reverse this case. See also Article 59(a), UCMJ, *10 USC § 859*(a). As the renowned English Judge, Sir John Powell, so [**112] wisely said a long time ago:

Let us consider the reason of the case. For nothing is law that is not reason. <3>

<3> Coggs v. Bernard, 2 Lord Raymond Reports 909, 911 (1703).

EVERETT, Senior Judge (concurring in part and concurring in the result):

I concur fully with the principal opinion that the defense challenge for cause was properly denied.

In deciding whether an issue as to lawfulness of the order should have been submitted by the military judge to the court-martial members, my starting point is the Uniform Code of Military Justice's provision that in a general or special court-martial the military judge "shall rule upon all questions of law and all interlocutory questions arising during the proceedings."

See Article 51(b), *10 USC § 851*(b). An "interlocutory question" may involve fact, law, or both. For example, if the question concerns admissibility of a confession made while the accused was a suspect, the judge will decide any factual dispute as to whether the [**113] accused was a suspect at the time of the statement and whether a warning was given pursuant to Article 31(b), [*129] UCMJ, *10 USC § 831*(b). If the dispute is not whether certain language was spoken by way of warning but whether the language sufficed to meet the requirements of Article 31(b), the judge will decide this issue of law in determining the "interlocutory question" of admissibility. Finally, if the dispute concerns not only the fact of whether any warning was given but also whether the language used was sufficient to satisfy Article 31(b), the judge must determine the facts and may then confront a question of law in deciding the "interlocutory question." See generally *United States v. Miller, 31 M.J. 247 (CMA 1990).*

Likewise, if the defense by motion to dismiss raises an issue of sufficiency of the evidence, the military judge will decide as an "interlocutory question" whether, if all the prosecution evidence is believed by the court-martial members, they could reasonably find the accused guilty beyond a reasonable doubt. However, when the ultimate question of guilt or innocence is submitted to the court-martial members, the military judge must [**114] refrain from deciding any issue of fact; and if he does make such a decision, he has erred. On the other hand, the military judge must instruct the court-martial members as to matters of law; and, in so doing, he may have to decide a "question of law." That "question of law" is not to be presented to the court-martial for second-guessing on their part.

In my view the roles of the military judge and the court-martial members correspond to those of judge and jury in federal criminal trials. This result -- although probably not constitutionally required -- was intended by Congress when the

Uniform Code of Military Justice was enacted a half century ago. When Congress later passed the Military Justice Act of 1968 and changed the "law officer" title to "military judge," it made this intent even clearer. Accordingly, I conclude that precedents like *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)* -- which apply to trials in a federal district court -- apply equally to courts-martial. Therefore, in a fraud case tried in a court-martial, the members would have the same responsibility to decide whether the accused's statements were "material" that civilian jurors would have if [**115] the case were tried in a federal district court; and the trial judge -- whether a federal district judge or a military judge -- should give the same instructions as to materiality. Failure to give such instructions in a trial by court-martial should carry the same consequences as would the same failure of a federal district judge in a criminal trial.

New was convicted of disobeying an order in violation of Article 92(2), UCMJ, *10 USC § 892*(2). The explicit language of Article 92(2) states that conviction requires a "lawful order", cf. Art. 92, *10 USC § 992*. However, even without this language, the requirement of lawfulness of the order would be implied. According to appellant, that requirement was not complied with and -- at the very least -- the court-martial members should have been instructed thereon. The analogy drawn is to the reversible failure to instruct on materiality in Gaudin.

In Gaudin, a consideration of facts was necessary to decide materiality, but in the case at bar, the facts on which appellant chiefly relies to raise an issue as to lawfulness are not even admissible in determining New's guilt or innocence. [**116] Appellant's defense that the order given him was not lawful rests largely on the premise that the order was given incident to a military operation that was beyond the constitutional authority of the President and Congress. In my view, the doctrine of

"political question" precluded the court-martial -- whether the military judge or the court members -- from considering evidence as to this defense. According to this doctrine, certain issues are non-justiciable because their decision by a court would unduly hamper the Executive and Legislative Branches and violate separation-of-powers theory. Cf. *Harisiades v. Shaughnessy, 342 U.S. 580, 589, 96 L. Ed. 586, 72 S. Ct. 512(1952).* The constitutionality of the military operation to which appellant was assigned presents a "political question" not suitable for a court-martial or a district court to decide. Moreover, I am unsure that, for purposes of standing, New had a sufficient individualized interest to contest in a court-martial [*130] for disobedience the constitutionality of the military operation to which he was assigned. *Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974).* Since appellant's contention as to unlawfulness [**117] of the order sought to present an issue that could not properly be considered by the court-martial, it required no instruction by the military judge to the court-martial members -- just as no jury instruction as to lawfulness of the order would have been required if lawfulness of the order had been at issue in a federal criminal trial.

In other contexts an entirely different approach may be required. For example, if no political question exists and the accused has standing to raise a pure question of law, the military judge will need to decide that question but will have no reason to submit that question to the court-martial members. For example, if the question is whether an order was given pursuant to a statute which violated the Constitution, this "question of law" will be decided by the military judge without instructing the members to consider the constitutionality of the statute. Such a question is quite unlike the issue of materiality in the Gaudin case, as to which the Supreme Court held that the trial judge should have instructed the jurors.

On the other hand, in *Unger v. Ziemniak, 27 M.J. 349 (CMA 1989),* the Court recognized that as to disobedience of [**118] an order there may be not only a legal issue for final determination by the military judge, but also a factual issue to be decided by the court-martial members under proper instructions. The question of law for the judge concerned whether, under any circumstances, an officer could be ordered to provide a urine specimen to an enlisted person to be tested for drugs. The factual determination -- to be made by the court-martial members -- concerned whether the order given the accused had required that her urine specimen be provided under degrading and humiliating conditions.* *Id. at 359.*

I can conceive of other situations in which the issue of lawfulness of an order should be submitted [**119] to the court-martial members under proper instructions. For example, if an order was lawful only if it called for performance within a specific geographic area and during a specific time period, the court-martial members must decide the facts as to that time and place. What if the questioned order was given by company commander Captain David to his subordinate, Sergeant Uriah, who disobeyed it because he believed that David was trying to get him killed and steal his wife Bathsheba? 2 Samuel 11 and 12. In that case, the intent of David might present a question of fact to be determined by the court-martial members under proper instructions.

In addition to relying on the alleged unconstitutionality of the military operation in which appellant New was ordered to deploy, the defense also claims that a factual question was

---

* This is a situation like those referred to in the current Manual's Discussion accompanying RCM 801(e)(5) quoted in Chief Judge Crawford's opinion when it states that "it is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact ...."

raised as to the existence of safety considerations for the orders. If a question of fact as to safety considerations was raised by the evidence concerning lawfulness of the contested order, this question would be for the court-martial members to decide under proper instructions. However, even a failure to instruct on an element of an offense is subject to harmless error [**120] analysis under some circumstances. Cf. *Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999).* In this case, I conclude that if there was any question of fact as to whether the order to wear battle dress insignia promoted safety, it was so insubstantial that the judge's failure to instruct thereon was not reversible error.

Since I conclude that, if the military judge erred at all, the error was not prejudicial to New, I concur in affirming the decision below.

UNITED STATES, Appellee v. Specialist MICHAEL G. NEW, United States Army, Appellant

ARMY 9600263

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

50 M.J. 729; 1999 CCA LEXIS 95

April 28, 1999, Decided

PRIOR HISTORY: [**1] Headquarters, 1st Infantry Division (formerly designated 3d Infantry Division). W. G. Jewell, Military Judge.

DISPOSITION: Affirmed.

COUNSEL: For Appellant: Henry L. Hamilton, Esq. (argued); Captain Norman R. Zamboni, JA; Captain Paul Fiorino, JA (on brief); Henry L. Hamilton, Esq.; Captain Paul Fiorino, JA (on reply brief); Colonel John T. Phelps II, JA.

For Appellee: Captain Arthur J. Coulter, JA (argued); Colonel Joseph E. Ross, JA; Lieutenant Colonel Frederic L. Borch III, JA; Captain Chris A. Wendelbo, JA; Captain John M. Bergen, JA (on brief); Colonel Joseph E. Ross, JA; Lieutenant Colonel Frederic L. Borch III, JA; Captain Chris A. Wendelbo, JA; Captain Arthur J. Coulter, JA (on supplemental brief).

JUDGES:

Before TOOMEY, ECKER, and CARTER, Appellate Military Judges. Judge ECKER and Judge CARTER concur.

OPINIONBY: TOOMEY

OPINION: [*733] OPINION OF THE COURT

TOOMEY, Senior Judge:

Contrary to his pleas, appellant was found guilty by a panel of officers and enlisted soldiers, sitting as a special court-martial empowered to adjudge a bad-conduct discharge, of failure to obey a lawful order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 [hereinafter UCMJ]. The panel [**2] sentenced appellant to a bad-conduct discharge. The convening authority approved the adjudged sentence.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant asserts nine assignments of error.[1]

---

[1] Assignment of Error I

THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING SPC NEW'S CAUSAL CHALLENGE AGAINST A MEMBER WHO ORDERED A SUBORDINATE TO WEAR THE UN UNIFORM AND DEPLOY TO MACEDONIA

Assignment of Error II

THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THAT SPC NEW FAILED TO OBEY A LAWFUL ORDER

Assignment of Error III

BECAUSE THE EVIDENCE AFTER THE GOVERNMENT'S CASE IN CHIEF (sic) SHOWED THAT SPC NEW WAS PREVENTED FROM

COMPLYING WITH THE ORDER, THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO GRANT THE DEFENSE MOTION FOR A FINDING OF NOT GUILTY

Assignment of Error IV

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BECAUSE THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE OF INABILITY

Assignment of Error V

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BECAUSE THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE OF OBEDIENCE TO ORDERS

Assignment of Error VI

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS ERRONEOUSLY ON THE DEFENSE OF MISTAKE

Assignment of Error VII

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL; HIS RIGHT TO A TRIAL BY MEMBERS; AND HIS RIGHT TO COMPULSORY PROCESS, CONFRONTATION OF WITNESSES, AND EFFECTIVE ASSISTANCE OF COUNSEL; WERE VIOLATED BECAUSE THE MILITARY JUDGE FAILED TO PERMIT MEMBERS TO HEAR EVIDENCE CONCERNING THE UNLAWFULNESS OF THE ORDER

Assignment of Error VIII

THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER WAS LAWFUL

For the reasons discussed herein, we find no merit in any of appellant's assertions of error.

[**3] FACTS

The United Nations [hereinafter UN] established a UN Protective Force [hereinafter UNPROFOR] in the Former Yugoslavian Republic of Macedonia [hereinafter FYROM] in 1992.[2] In 1993, the United States contributed [*734] troops to this protective force.[3] In 1995, this force was redesignated as the United Nations Preventive Deployment Force [hereinafter UNPREDEP].[4]

[**4] In August of 1995, the 1st Battalion, 15th Infantry Regiment, 3d Infantry Division [hereinafter 1/15 Infantry] received orders to assume the FYROM UNPREDEP mission effective 1 November 1995.[5] The 1/15 Infantry identified their mission needs, established a task organization, and began

---

Assignment of Error IX

AN APPROVED SENTENCE THAT INCLUDES A BAD CONDUCT (sic) DISCHARGE FOR SPC NEW'S OFFENSE IS INAPPROPRIATELY SEVERE

2 S.C. Res. 795, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/795 (1992). The FYROM government requested this military force to observe, monitor, and report concerning activities along the FYROM border with Albania and the Federal Republic of Yugoslavia (Serbia and Montenegro).

3 S.C. Res. 842, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/842 (1993). President Clinton advised Congress by letter of this action and continued to advise Congress every six months in accordance with the War Powers Resolution. Pub. L. No. 93-148 at 5, 87 Stat. 555 (1973) (codified at 50 U.S.C. § § 1541-1548 (1994)).

4 S.C. Res. 983, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/983 (1995).

5 The 1/15 Infantry's lead elements began deploying on 21 October 1995.

intense training for the mission. Because of the harsh winter weather conditions expected in the FYROM and dispersal of troops in small isolated outposts, the task organization augmented each squad with a medic. Appellant, a medic, was attached for the mission to a squad of Company A, 1/15 Infantry. Early in the train-up period, appellant expressed concern about deploying on the UN mission and wearing UN accouterments on his United States Army battle dress uniform [hereinafter BDU]. Appellant stated his belief that wearing UN accouterments on his United States Army BDUs represented an involuntary change of allegiance from the United States to the United Nations. Appellant's concerns were spread on the internet by appellant's father; were reported by the media, including the *Stars and Stripes* newspaper; and were publicly noted by several members of Congress and political candidates. Appellant's [**5] noncommissioned officer leadership, company commander, and battalion commander each spoke personally with appellant to alleviate his doubts concerning the lawfulness of both the United States Army participating in the UN FYROM mission and the prescribed uniform. Appellant's battalion commander, Lieutenant Colonel (LTC) Layfield, met personally with appellant three times to discuss appellant's concerns. Appellant did not tell anyone in his chain of command prior to trial that he believed that the prescibed uniform conflicted with Army Regulation [hereinafter AR] 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Sept. 1992). Appellant continued to train with the unit throughout its preparation and validation period.

Prior to deployment, the unit was granted block leave.[6] Appellant visited Washington, D.C., met with retired Marine Reserve Colonel (COL) Robert Ray, who was to become one

---

[6] The entire unit was given leave to attend to personal business and concerns.

of his civilian defense counsel, and was [**6] introduced to several of the legislators who expressed concern with the legality of the FYROM UNPREDEP mission and President Clinton's representations concerning the mission. On 2 October 1995, after block leave, the unit received a briefing concerning the origins and legality of the FYROM UNPREDEP mission. The briefing was prepared and presented at LTC Layfield's request by an operational law attorney. The briefing did not specifically address the legality of the United States Army BDU modifications for the FYROM UNPREDEP mission.[7] Neither appellant nor any of the other soldiers asked any questions concerning the lawfulness of the FYROM UNPREDEP mission or modified BDUs during the briefing's question and answer period. At the conclusion of the legal briefing, LTC Layfield addressed the unit, gave a short "pep talk," and ordered them to begin wearing the FYROM UNPREDEP mission uniform effective 0900 hours, 10 October 1995, at a battalion formation, and continuing until the mission's end.[8]

[**7] [*735] At a company formation on 4 October 1995, appellant's company commander, Captain (CPT) Palmateer, reissued LTC Layfield's orders concerning the UN mission uniform and the 0900 hours, 10 October 1995, battalion formation. Captain Palmateer wanted to ensure that the company understood the uniform requirement and formation order and that any soldier who missed the 2 October 1995

---

[7] The uniform ordered consisted of the regularly issued United States Army BDUs with a United States flag sewn on one shoulder, a UN blue patch sewn on the other shoulder, and UN blue field cap. Other FYROM UNPREDEP mission uniform accouterments issued for the mission included a khaki brassard with a UN blue patch affixed to it, a UN blue scarf, a UN blue beret to be fitted with a UN metal badge to be issued in the FYROM, and a UN identification card which was also to be issued in the FYROM.

[8] The mission was scheduled to be completed 11 April 1996.

briefing was aware of the order. Captain Palmateer also ordered a company formation in the FYROM UNPREDEP mission uniform immediately preceding the 0900 hours, 10 October 1995, battalion formation, in order for the company to assume its position thereafter in the battalion formation. Once again, appellant was present at the time CPT Palmateer issued this order and asked no questions and expressed no concerns regarding either the lawfulness of the unit's mission to deploy as the FYROM UNPREDEP force or the mission's uniform modifications. The soldiers were subsequently issued the required UNPREDEP mission uniform items for their uniforms. Appellant turned in the [**8] required two sets of BDUs to be tailored to include the required American flag and blue UN shoulder patches.

As ordered by CPT Palmateer, appellant's company assembled in formation at 0845 hours, 10 October 1995, in preparation for the 0900 hours battalion formation. Appellant reported to the company formation in United States Army BDUs without the ordered FYROM UNPREDEP mission uniform modifications. As a result, appellant was removed from the company formation at about 0845 hours. The remainder of the company then assumed its place in the 0900 hours battalion formation. At approximately 1000 hours, 10 October 1995, LTC Layfield offered appellant a "second chance" to comply with the then effective standing FYROM UNPREDEP uniform order. Appellant persisted in his refusal to comply with the orders to wear the United States Army BDUs with the prescribed FYROM UNPREDEP mission uniform modifications. Appellant was dec-deployable and the unit began deploying to the FYROM without him on 21 October 1995.

Appellant's first trial session was held on 24 October 1995. Appellant was tried, without objection, on a duplicitous specification of failure to obey an "other" lawful order (Article

92(2), [**9] UCMJ).[9] Appellant did not request a bill of particulars.[10]

Appellant made numerous pretrial motions challenging the legality of the FYROM UNPREDEP mission and its uniform. The military judge ruled that these were interlocutory matters and determined that both the FYROM UNPREDEP mission and the mission uniform modifications were legal. Accordingly, appellant was precluded at trial from presenting evidence to the court-martial panel challenging President Clinton's legal characterization and justification of the mission and [**10] the legality of the orders modifying the United States Army BDUs to include the United States flag and UN insignia shoulder patches, UN headgear, and other accouterments as appropriate. Appellant's defense was thereby limited to asserting affirmative defenses of mistake, inability, and obedience to higher orders.

In his trial testimony on the merits appellant admitted that: he had knowledge of the charged orders; he knew his commanders had authority to give orders; he did not want to wear the "UN" uniform; he thought that wearing the UN insignia and beret constituted a shift of allegiance from the United States to the United Nations; he thought that "some colonel" over his battalion commander came up with the uniform idea; he believed that his commanders' orders conflicted with the provisions of the Army uniform regulation,

---

[9] Specification:

In that Specialist Michael G. New, US Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same.

[10] *See* Rule for Courts-Martial 906(b)(5) and (6) [hereinafter R.C.M.].

AR 670-1, but that his belief was based upon a "skimming" of AR 670-1; he never sought a clarification from [*736] his superiors of the conflicts he believed existed between their orders and AR 670-1; he reported for the 10 October 1995 formations without the ordered FYROM UNPREDEP uniform modifications; and he declined LTC Layfield's 1000 hours, 10 October 1995, "second [**11] chance" to comply with the orders, stating that he intended to remain in his unmodified BDUs for the remainder of that day "unless they could show [him] some legal authority for [the modifications]."

Additional facts necessary for the resolution of individually assigned errors are set forth in the discussion of those errors.

LAWFULNESS OF ORDERS TO MODIFY US ARMY BATTLE DRESS UNIFORM TO INCLUDE UNITED NATIONS ACCOUTERMENTS (AE VII AND VIII)

Facts

Appellant asserts that the military judge violated appellant's Fifth and Sixth Amendment Constitutional rights by determining the lawfulness of the violated orders as an interlocutory matter. Appellant contends that the military judge's action improperly denied appellant the opportunity to present evidence concerning the orders' lawfulness and to have the court-martial panel decide the question. Appellant further asserts that the military judge erred in finding the orders lawful. We disagree.

The issue of the orders' lawfulness was extensively litigated at trial. Appellant's arguments at trial and on appeal are substantially the same. The military judge considered appellant's evidence and arguments concerning this matter [**12] primarily in the context of appellant's motions to dismiss the charges against him because of the orders'

"unlawful" nature. The crux of appellant's argument was that President Clinton misled Congress concerning the legal basis of the FYROM UNPREDEP mission and that the mission was illegal as undertaken.[11] n11 Additional evidence was presented concerning uniform modifications permissible under the provisions of AR 670-1, prohibitions on accepting gifts and titles from foreign governments and wearing unauthorized insignia and decorations,[12] and the FYROM UNPREDEP command and control structure.

[**13] In support of his motions, appellant presented legal briefs; the testimony of Mr. David Sullivan (treated as an expert in international law); and copies of numerous UN Security Council Resolutions and Secretary-General reports addressing the UN's actions in the former Yugoslavia (Croatia, Bosnia-Herznogovina [hereinafter Bosnia], the Federal Republic of Yugoslavia (Serbia and Montenegro), and the FYROM).

Mr. Sullivan reviewed the relevant Security Counsel resolutions concerning the FYROM UNPREDEP, and concluded that UN Charter, Chapter VII, was the mission's legal basis because the first referenced document in the chain, S.C. Res. 713 (1991), dealing with the UN's initial actions in

---

[11] Specifically, appellant asserted that the President misrepresented the FYROM UNPREDEP mission as a UN Charter, Chapter VI, and United Nations Participation Act, Section 7 (22 U.S.C. § 287d (1994)) [hereinafter UNPA], action in order to avoid obtaining prior congressional approval for the mission. Appellant asserted that the FYROM UNPREDEP was actually a United Nations Charter, Chapter VII, action requiring congressional approval pursuant to UNPA, Section 6, prior to the undertaking. No congressional approval was sought nor given.

[12] United States Constitution, Article I, Section 9; 5 U.S.C. § 7342(a)(4) (1994); 32 C.F.R. 578.19a; *Manual for Courts-Martial, United States* (1995 ed.), Part IV, para. 113 (UCMJ art. 134, Wearing unauthorized insignia) [hereinafter *MCM*]; AR 670-1, para. 3-4k.

"Yugoslavia," cited UN Charter, Chapter VII, as its basis.[13] Appellant argued that the nature of the operation and this derivative reference [**14] supported the conclusion that the FYROM UNPREDEP mission was likewise a UN Charter, Chapter VII, operation. While numerous subsequent UN resolutions dealing with Bosnia specifically cited Chapter VII as the basis of those actions, the FYROM resolutions, in general, do not cite any UN Charter chapter as their basis. [*737] Appellant's expert attributed the absence of such references in the FYROM resolutions to political considerations necessary for the establishment and maintenance of a UN coalition by the United States and its allies. He submitted that because the Bosnia UNPROFOR was a Chapter VII operation, the FYROM UNPREDEP was also a Chapter VII operation despite its separate creation and evolution.

The government cross-examined Mr. Sullivan concerning the differences between the Bosnia UNPROFOR and the FYROM UNPREDEP and submitted [**15] briefs on the matter, but called no witnesses. The government asserted primarily that the questions of the President's representations and the United States' participation in the FYROM UNPREDEP were nonjusticiable political questions.

In denying appellant's motions to dismiss, the military judge fairly summarized appellant's challenges to the orders' lawfulness as follows:

> One, the order was unlawful, and that it was issued pursuant to an unlawful deployment of the [appellant]; two, the order was unlawful as it required the unauthorized alteration of the [appellant's] United

---

[13] S.C. Res. 713, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/713 (1991) established an arms embargo against "Yugoslavia." Many of the other cited resolutions dealt with the UNPROFOR in Bosnia.

> States Army uniform; three, the order was unlawful as its effect was to subject the [appellant] to involuntary servitude as a U.N. soldier and, in effect, placing him in involuntary servitude in violation of the 13th Amendment of the United States Constitution; and fourth, the order was unlawful in that it was issued in breach of the [appellant's] enlistment contract.
>
> After considering trial and defense counsel's arguments on the motion, the military judge determined that the lawfulness of an order was a question of law and therefore an interlocutory matter for the judge's determination. [**16] Upon further consideration of the evidence provided, the military judge determined that the orders were lawful.

The military judge made the following findings of fact concerning the FYROM UNPREDEP mission:

> The President believed the deployment to be a matter important to United States foreign policy and national security interests.
>
> "The President felt his actions ... [were] consistent with United Nations Security Council resolutions evidencing multinational consensus for action in the region, and that his action was in accordance with Section 7 of the United Nations Participation Act ...."
>
> The President ordered the deployment in accordance with his Constitutional authority as Commander-in-Chief and Chief Executive.
>
> Throughout the series of deployments the President informed Congress consistent with Section 4 of the War Powers Resolution.

Implementing the President's orders, appellant's unit, the 1/15 Infantry, was selected and ordered to perform the FYROM UNPREDEP mission.

Appellant's commanders issued orders for members of the command to modify their United States Army BDUs to include specific distinctive accouterments for the duration of the [**17] FYROM UNPREDEP mission. Modifications included distinctive UN blue headgear, a UN blue cloth patch sewn on the uniform's right shoulder, and the addition of a cloth United States flag on the uniform's left shoulder.

The commander in charge of a maneuver may prescribe the uniform to be worn in a maneuver area. Applicable regulations enable commanders to prescribe uniform modifications considered necessary in the interest of safety so long as the items are furnished at no cost to the individual soldier. The FYROM UNPREDEP uniform alterations were lawful and in accordance with AR 670-1 because the modified uniform's easily recognizable and identifiable features "[have] a practical combat function which may enhance both the safety and/or tactical effectiveness of combat-equipped soldiers performing [UNPREDEP] tactical operations."

The President and United States military commanders maintained command authority over United States forces in FYROM regardless of operational control by non-United States commanders.

[*738] The United States military chain-of-command remained inviolate.

BEST AVAILABLE COPY

> The President determined that the deployment was pursuant to Chapter VI of the UN Charter [**18] and complied with troop limitations for Chapter VI, UN Charter, deployments established by Section 7 of the United Nations Participation Act.
>
> The FYROM UNPREDEP mission uniform accouterments were not gifts from foreign governments in violation of any statutory or regulatory prohibitions and complied with Section 7 of the United Nations Participation Act, providing: "Personnel involved in non-combatant assistance to the United Nations may accept directly from the United Nations any or all of the allowances or perquisites to which they are entitled, and extraordinary expenses and perquisites incident to such detail."

Concerning appellant's argument that because the FYROM UNPREDEP mission was illegal, the order to alter the Army uniform must also be illegal, the military judge found:

> "The order issued by [appellant's] commanders on 2 and 4 October 1995 was not an order to deploy, but merely an order made in preparation for the anticipated deployment of 1/15th Infantry to Macedonia. Accordingly, any violation of that order by [appellant] on 10 October 1995 was not, in fact, a violation of an order to deploy. It did not effectively call into issue the underlying legality [**19] of the deployment."
>
> An order to wear the prescribed FYROM UNPREDEP mission uniform "is not an order which has the meaning and/or effect to deploy to Macedonia or anywhere else."
>
> The emphasis in the military is upon obedience to orders. One disobeys an order at one's own peril. The

> law affords protection to those who obey all but the most patently illegal orders, i.e., orders the accused knows to be unlawful, or a person of ordinary sense and understanding would have known the orders to be unlawful.

Appellant's commanders' orders to wear a United States Army uniform including distinctive accouterments associated with the United Nations do not violate the United States Constitution, federal statute, contractual provision relating to service as a soldier in the United States armed forces, or amount to involuntary servitude, as defined by the 13th Amendment to the United States Constitution.

The military judge agreed with the government that the FYROM UNPREDEP deployment was an executive action and therefore a nonjusticiable political question, finding, under the doctrine of justiciability, that issues of the utilization and funding of the armed forces are beyond the consideration [**20] of military trial courts. United States v. Huet-Vaughn, 43 M.J. 105, 115 (1995).

Discussion

Lawfulness of the Orders as a Matter for Judicial Determination

The military judge did not err by determining the lawfulness of the orders as an interlocutory question of law and by not submitting the question to the court-martial panel.

The military judge is the presiding officer in a court-martial and rules on all interlocutory questions and questions of law raised during a court-martial. UCMJ art. 51(b); R.C.M. 801(a) and (a)(4). When disobedience of an order is charged, the legality of the order is normally a question of law to be determined by the military judge as an interlocutory matter.

UCMJ art. 51(b); R.C.M. 801(e)(1) and (5) discussion; *United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379, 381 (1965); *United States v. Calley*, 46 C.M.R. 1131, 1183 (A.C.M.R.), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); *United States v. Hawkins*, 30 M.J. 682, 684 (A.F.C.M.R. 1990).

"A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty." R.C.M. 801(e)(5) discussion. The military judge's determination of [**21] the orders' lawfulness did not finally decide the issue of appellant's guilt. The government was required to prove that the orders were issued by officers empowered to give such orders, that appellant had knowledge of [*739] the orders, that appellant had a duty to obey the orders, and that appellant failed to obey the orders. *See MCM*, Part IV, para. 16b(2).

Correctness of the Military Judge's Finding that the Orders Were Lawful

Whether the military judge correctly determined that the orders were lawful is a question of law to be reviewed *de novo*. *United States v. Padgett*, 48 M.J. 273, 277 (1998) (citing 2 S. Childress and M. Davis, *Federal Standards of Review* § 7.05 (2d ed. 1992)); *United States v. Ayala*, 43 M.J. 296, 298 (1995). We hold that the military judge did not err in determining the orders to be lawful.

1) Presumption of Orders' Lawfulness

An order is presumed to be lawful. W. Winthrop, *Military Law and Precedents* 297 (2d ed. 1920 Reprint) [hereinafter Winthrop]. A soldier disobeys an order "on his own personal responsibility and at his own risk." *See* Winthrop, at 576; *MCM*, Part IV, para. 14c(2)(a)(i). Appellant contested [**22] the orders' legality both at trial and on appeal. Appellant bears the heavy burden of showing that the orders were illegal.

United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5, 8 (1972).

As this court observed and reemphasized in *United States v. Rockwood*, 48 M.J. 501 (Army Ct. Crim. App. 1998):

> An individual soldier is not free to ignore the lawful orders or duties assigned by his immediate superiors.
>
> For there would be an end of all discipline if the seamen and marines on board a ship of war [or soldiers deployed in the field], on a distant service, were permitted to act upon their own opinion of their rights [or their opinion of the President's and United Nations' intent], and to throw off the authority of the commander *whenever they supposed it to be unlawfully exercised.*

Rockwood, 48 M.J. at 506 (quoting *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 403, 13 L. Ed. 1036 (Dec. Term, 1851)) (emphasis added) (footnote omitted).

Unless the order requires an obviously illegal act, or is obviously beyond the issuer's authority, the servicemember will obey the order:

> Where the order is apparently regular and *lawful on its face*, [**23] he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.*

Rockwood, 48 M.J. at 506 (quoting *United States v. Calley*, 22 U.S.C.M.A. 534, 543, 48 C.M.R. 19, 28 (1973) (quoting Winthrop, at 296-297)). "The success of any combat,

peacekeeping, or humanitarian mission, as well as the personal safety of fellow servicemembers, would be endangered if individual soldiers were permitted to act upon their own interpretation" of constitutional, presidential, congressional or military authority, and orders issued pursuant to such authority. *Rockwood*, 48 M.J. at 506-507.

Moreover, as stated in *McCall v. McDowell*, 1 Abb. 212, 15 F. Cas. 1235 (Cir. Ct. D. California 1867):

> The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and [**24] obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

2) Political Questions and Nonjusticiability

The military judge correctly determined that the question of the lawfulness of the FYROM UNPREDEP mission was a nonjusticiable political question. This court will respect both the President's powers as well as the powers of the nation's elected representatives in Congress. *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990). *See also Baker* [*740] *v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962); *Huet-Vaughn*, 43 M.J. at 115; *Rockwood*, 48 M.J. at 507.

c. Lawfulness of Commander's Modification of Army Battle Dress Uniform

Army Regulation 670-1, paras. 1-18 and 2-6d, allow commanders in maneuver areas to order necessary mission uniform modifications and allow uniform modifications

necessary for safety reasons. The military judge found that the distinctive uniforms and easily recognizable identifiers which appellant's commanders ordered for the FYROM UNPREDEP mission had the practical combat function of [**25] enhancing the unit's tactical effectiveness and safety while performing the FYROM UNPREDEP mission and therefore were permissible changes envisioned by the regulation. We agree with the military judge's findings in this matter.

d. Conclusion

Considering the long established historic and legal precedent that orders are presumed to be legal, the evidence of record supporting the legality of the charged orders, the military judge's detailed and specific findings, which we adopt as our own, and the political, nonjusticiable nature of the underlying FYROM UNPREDEP mission, we find that the military judge was correct in determining that the question of the orders' lawfulness was an interlocutory question for the military judge's determination and that as a matter of law, the orders were lawful. There was no error.

ALLEGED INSTRUCTIONAL ERRORS (AE V, VI, and IV)

Appellant asserts that the military judge erred in his instructions to the court-martial panel on findings by: 1) failing to separately instruct the court-martial members on the affirmative defense of obedience to orders; 2) erroneously instructing the court-martial members on the defense of mistake; and 3) [**26] failing to *sua sponte* instruct the court-martial members on the affirmative defense of inability. We find appellant's assertions to be without merit.

Facts

The military judge and appellant's trial defense counsel engaged in lengthy discussions concerning the findings instructions. Appellant's counsel requested separate defense of mistake and obedience to orders defense instructions.[14] The military judge tailored a single instruction that combined the concepts of a mistake defense and an obedience to orders defense.[15]

---

[14] R.C.M. 916(j); Dep't of the Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (1 May 1982), para. 5-11, Ignorance or Mistake of Law (C1, 15 Feb. 1985), and para. 5-8, Obedience to Orders [hereinafter Benchbook].

[15] The military judge gave the following instruction:

Now, members of the court, the evidence has raised the issue of mistake on the part of the accused concerning a duty to obey the order because it was unlawful. The accused contends that, on 10 October 1995, he believed the order to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, was unlawful. Specifically, the accused's contention *is, he believed that, by obeying the order, he would be required to violate AR 670-1, Wear and Appearance of Army Uniforms and Insignia.* I have judicially noticed that AR 670-1 is a lawful regulation that the accused had a duty to obey that regulation.

The government contends, first, that this is not the reason the accused failed to obey the charged order; and, second, if it is the reason for the disobedience, it is unreasonable.

If the accused mistakenly believed, by obeying the order, he would be required to violate AR 670-1, he is not guilty of the offense if his belief was reasonable. To be reasonable, the belief must have been based on information, or lack of it, which would indicate to a reasonable person that, by obeying the order, he would be required to violate AR 670-1. In deciding this issue, you should consider the inherent probability or improbability of the evidence on this matter. You should consider, along with all the evidence in this case, the following: *I previously instructed you that, as a matter of law, the order in this case, as described in the specification -- if, in fact, there was such an order -- was a lawful order. I further instruct you*

[**27] [*741] **Law**

Rule for Courts-Martial 920 states the military judge's duties regarding instructions on findings.

(a) *In general.* The military judge shall give the members appropriate instructions on findings.

---

at this time that, as a matter of law, the accused would not have violated AR 670-1 by obeying the order in this case as described in the specification, if, in fact, there was such an order.

Members of the court, *the accused did not have the benefit of the Court's rulings on the lawfulness of the order on 10 October 1995, the date of the charged order violation.*

All persons in the military service are required to strictly obey and properly execute the legal orders of their lawful superiors. An order or regulation requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. While the unlawfulness of an order or regulation is a defense to the charge of disobedience, the inherent emphasis in the military upon obedience, except in the cases where the order is patently illegal encourages compliance with orders irrespective of legality. Immunity based on faithful obedience exists except where the accused knew the orders or regulations to be unlawful, or a person of ordinary sense and understanding would have known the orders or regulations to be unlawful. Additionally, the mistake cannot be based on a negligent failure to discover the true facts.

The burden is on the prosecution to establish the accused's guilt. *If you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused was not under the mistaken belief that, by obeying the order, he would be required to violate AR 670-1, the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that, by obeying the order, he would be required to violate AR 670-1, if you are convinced beyond reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable, the defense of mistake does not exist.*

(Emphasis added.)

Discussion

Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. *Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented.*

(Emphasis added.)

As provided for by R.C.M. 920(e)(7)'s Discussion, it is appropriate for the military judge's instructions to summarize and comment upon the evidence. However, such summarization and commentary must be accurate, fair, dispassionate, and accomplished without partiality. Our standard of review for the overall sufficiency of instructions is *de novo*. *United States v. Maxwell*, 45 M.J. 406, 424 (1996) (citing *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)).

Denial of Requested Obedience to Orders Instruction (AEV)

Facts

At trial, appellant asserted that the obedience to orders defense [**28] arose in two respects: 1) appellant believed that the FYROM UNPREDEP mission uniform order contradicted, and was subordinate to, AR 670-1, and 2) appellant obeyed CPT Palmateer's order to leave the 10 October 1995 company formation and was thereby precluded from attending the 0900 hours, 10 October 1995, battalion formation.

In discussing the affirmative defense of mistake instruction with the military judge, appellant's civilian defense counsel noted, "Right. We believe it also raises an obedience to orders

defense .... And *I recognize that they dovetail a bit, but lawfulness dovetails into it, too. . .*" (emphasis added). The military judge responded:

It takes very little evidence to raise a special defense such as this, but I don't believe we have even that little evidence to raise this particular defense, so I will not give the instruction. I will incorporate, though, your theory and [appellant's] testimony with respect to the uniform regulation in the mistake of law instruction.

Law

"The defense is not entitled to a requested instruction unless it is correct, necessary and critical." *United States v. Eby*, 44 M.J. 425, 428 (1996). "The military judge [**29] is not required to give the instruction requested by counsel ... as long as the issue is adequately covered in the instructions." R.C.M. 920(c) discussion.

As stated in *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993):

> [*742] While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give. *United States v. Smith*, 34 M.J. 200 (CMA 1992); RCM 920(c), Discussion. *The test to determine if denial of a requested instruction constitutes error is whether (1) the charge is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.' United States v. Winborn*, 14 U.S.C.M.A. 277, 282, 34 C.M.R. 57, 62 (1963).

(Emphasis added.)

The military judge's determination not to give the requested instruction is reviewed for an abuse of discretion. *Damatta-Olivera*, 37 M.J. at 478. A military judge does not abuse his discretion unless the action is "arbitrary," "fanciful," "clearly unreasonable," or "clearly erroneous." [**30] *United States v. Mosley*, 42 M.J. 300, 303 (1995); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). A mere difference in opinion does not constitute an abuse of discretion. *Mosley*, 42 M.J. at 303.

Rule for Court Martial 916(d) and its Discussion set forth the defense of obedience to orders: "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."

Discussion a. Compliance with AR 670-1

The military judge correctly determined that the charged order was legal (*see* Assignments of Error VII and VIII, above). Appellant's commanders' orders did not contradict superior orders. *See United States v. Young*, 1 M.J. 433, 437 (C.M.A. 1976). Appellant's testimony established that appellant: 1) read AR 670-1 in only a cursory manner; 2) found and relied upon only provisions of that regulation which he believed supported his position; 3) had the opportunity to seek clarification of the orders but did not seek assistance or guidance from any superior noncommissioned officer or officer to interpret the [**31] regulation; and 4) proceeded to violate his commanders' orders based upon his cursory reading and incorrect interpretation of the regulation. The military judge correctly determined that appellant's theory did not reasonably raise a defense of obedience to orders.

b. Compliance with CPT Palmateer's Order to Leave the Formation

Appellant's compliance with CPT Palmateer's order to leave the company formation does not establish an obedience to orders defense for his failure to comply with the order regarding the 0900 hours battalion formation. Appellant knew when he reported out of uniform to the company formation that the company formation was an integral part of the battalion formation and that, after entering the company formation, he would not have the opportunity to don the appropriate uniform for the 0900 hours battalion formation. Indeed, appellant testified that he had no intent to wear the ordered uniform. Moreover, a refusal by word and/or deed under circumstances evincing an intentional defiance of authority of an order "'not capable of being fully and immediately executed, but *requiring certain preparatory steps, which preparatory steps are intended to be, and* [**32] *are capable of being, commenced immediately*, and continued without material interruption until full execution has been accomplished,'" constitutes the offense of disobedience. *United States v. Patten*, 43 C.M.R. 820, 823 (A.C.M.R. 1971) (emphasis added) (quoting *United States v. Turpin*, 35 C.M.R. 539, 541 (A.B.R. 1964)); *cf. MCM*, Part IV, para. 14c(2)(g). Appellant refused to take the necessary preparatory steps to comply with the orders. The disobedience offense was already complete for both LTC Layfield's and CPT Palmateer's orders when appellant was ordered from the company formation. *Patten*, 43 C.M.R. at 823. The military judge correctly determined that appellant's theory did not reasonably raise a defense of obedience to orders.

[*743] The obedience to orders defense is a shield for those who obey orders; not a sword for those who would disobey orders. As this court said in *United States v. Lusk*, 21 M.J. 695 (A.C.M.R. 1985):

> In combat, where the very existence of the nation is at stake, obedience to orders is vital. Sometimes commanders must order soldiers to lay down their very lives. ... Those soldiers must be relied upon to obey. In peacetime, soldiers [**33] must be trained in the same climate of obedience. The discipline which enables armies to prevail cannot be switched on and off like a lightbulb. The soldier must be conditioned to err on the side of obedience. Consequently, a soldier who disobeys an order because he believes that the order is illegal may nevertheless be punished if the order is in fact a lawful one.

Lusk, 21 M.J. at 700 (footnote omitted).

Appellant's tortured claim of an obedience to superior orders defense simply does not fit within the context of R.C.M. 916(d) or other legal precedents. Accordingly, we find that the military judge did not abuse his discretion by denying the requested instruction. *Eby*, 44 M.J. at 428. Regardless, appellant received the benefit of his claim by the military judge's inclusion of the concept of obedience to orders in the affirmative defense of mistake instruction.

Assuming arguendo that such a defense was raised, while a separate obedience to orders instruction was not given, the instruction that was given was correct, incorporated the substance of the obedience to orders instruction in the affirmative defense of mistake instruction, and did not deprive the appellant [**34] of a defense or improperly impair the presentation of the defense case. *See Damatta-Olivera*, 37 M.J. at 478. In the total context of the instructions the requested matter was reasonably covered. *See United States v. Bradley*, 28 M.J. 197, 202 (C.M.A. 1989). The military judge's instruction correctly stated the law concerning obedience to orders. It was not inappropriate for the military judge to relate

the legal concept of obedience to the circumstances of the disobedience and to the evidence *in toto* including the military judge's interlocutory determinations.

Affirmative Defense of Mistake Instruction (AE VI)

Facts

Because appellant presented a defense that might be interpreted to raise a mistake of law, a mistake of fact, or a mixed mistake defense, the military judge crafted an affirmative defense of mistake instruction, as quoted above, from the Benchbook's general intent mistake of fact instruction.[1] The military judge concluded that a tailored instruction: 1) was necessary; 2) fairly included the matters appellant requested concerning the affirmative defenses of obedience to orders and mistake; 3) correctly stated the law; and 4) was framed [**35] in a manner to place the reasonableness of appellant's actions into context with the evidence and law. We agree.

Appellant alleged the following specific deficiencies both at trial and on appeal:

> The instructions "unduly emphasized the necessity to obey orders and had nothing to do with the special defense of mistake."
>
> The instructions discussed the extraneous concept of obedience to orders as a defense, i.e., immunity following from such obedience.

---

[1] Benchbook, para. 5-11, Ignorance or Mistake of Law (C1, 15 Feb. 1985).

The instructions advised the court-martial panel that "as a matter of law [appellant] would not have violated AR 670-1 by obeying the order in this case" and "as a 'matter of law' AR 670-1 would not have been violated if [appellant] wore the [FYROM UNPREDEP] uniform."

"The instructions gratuitously re-emphasized the military judge's decision that [the] order was lawful" while emphasizing that the military judge determined that the charged order did not conflict [**36] with the uniform regulation, AR 670-1.

The instructions portrayed appellant's "mistake defense as absurd and unbelievable."

[*744] The instructions provided the wrong *mens rea* standard; honest and reasonable versus merely honest.

The orders appellant was charged with disobeying were issued by his superior officers, LTC Layfield and CPT Palmateer. While such disobedience could have been charged under Article 90, UCMJ, as a specific intent *willful disobedience* of a *superior commissioned officer* offense, the disobedience in the instant case was charged under Article 92(2), UCMJ, as a general intent failure to obey an "*other*" lawful order offense. However, appellant argued at trial and on appeal that Article 92(2), UCMJ, has a "knowledge" element and therefore should be treated as a specific intent or special state of mind offense. We disagree.

Discussion

Examining the military judge's instruction in its totality we find no error. We agree with the military judge that his instruction fairly and correctly stated the law and facts of this case. R.C.M. 920(a) and Discussion; R.C.M. 920(c) and Discussion; and R.C.M. 920(e) and Discussion; *Damatta-Olivera*, [**37] 37 M.J. at 478. The military judge correctly determined and instructed that in the instant case the applicable *mens rea* standard for any affirmative defense of mistake of law, mistake of fact, or mixed mistake of law and fact raised by the appellant was "honest and reasonable."

Combined Instructions

While the incorporation of the concept of an obedience to orders defense into the affirmative defense of mistake instruction was unique, it was dictated by the unique facts of this case. The military judge correctly determined that the evidence did not reasonably raise the affirmative defense of obedience to orders (*see* Assignment of Error V, above). The instruction's discussion of the military's emphasis on obedience to orders, protections (immunity) for those who obey all but patently unlawful orders, and the lawfulness of the orders in question was necessary and appropriate in order to place the "reasonableness" of appellant's actions into context for the court-martial panel. The military judge also: emphasized the appellant's "good character" evidence; noted that appellant did not have the benefit of the judge's ruling concerning the orders' lawfulness when the [**38] appellant made his decision to disobey his commanders' orders; and provided the standard instructions concerning the court-martial panel's duties to independently decide the facts, apply the law, and to disregard any statements the military judge might have made indicating an opinion or partiality. Overall, the military judge

tailored his instructions with the required "even hand." *Cf. United States v. Grandy*, 11 M.J. 270, 277 (C.M.A. 1981).

***Mens Rea* Standard**

The military judge employed the correct *mens rea* standard regardless of whether appellant's asserted affirmative defense of mistake was one of law, fact, or mixed.

Mistake of fact is a limited defense and mistake of law is generally not a defense. R.C.M. 916(j); R.C.M. 916(l). In some cases, however, where a special state of mind (specific intent, willfulness, knowledge of particular facts, or premeditation) is required, a mistake of fact or law may serve to negate such a special state of mind.

The essence of "other" order crimes is simple noncompliance with *known* military orders. The appellant mistakenly asserts that Article 92(2)'s "knowledge" element raised this offense *in its entirety* to the [**39] status of a special state of mind offense thereby making an "honest" mistake an affirmative defense. If appellant were arguing that his mistake or ignorance went to having actual knowledge of the orders or the authority of the "orderer" to give orders, he might be correct. *See United States v. Levell*, 14 C.M.R. 624, 630 (A.F.B.R. 1954); *United States v. Alexander and Gordon*, 11 C.M.R. 489, 492 (A.B.R. 1953); *United States v. Brown*, 11 C.M.R. 332, 338-39 (A.B.R. 1953). However, appellant's alleged mistake did not go to the element of having specific or actual knowledge of the order he is charged with disobeying or mistake as to the authority of the soldier giving the order to do so. Appellant knew his officers and understood their orders; appellant simply disagreed with the orders' appropriateness. *MCM*, Part IV, para. 16c(2)(c)(i). [*745] Appellant's mistake, if he made one, was his decision that the orders were unlawful because of perceived conflicts with AR 670-1. The matter of

the orders' lawfulness was not in contest because of the military judge's proper determination of their lawfulness (*see* Assignments of Error VII and VIII, above).

Because the evidence did not [**40] raise a legal or factual mistake by appellant concerning the actual knowledge element of the otherwise general intent offense of disobedience of orders, Article 92(2), UCMJ, the military judge was correct in employing the honest and reasonable standard. R.C.M. 916(j). *Cf. United States v. Peterson*, 47 M.J. 231, 235 (1997).

Sua Sponte Inability Instruction (AE IV)

Appellant asserts on appeal that the defense of inability was raised by evidence that after the appellant reported in the wrong uniform to the 10 October 1995, company formation, he was removed from the formation and was thereby rendered unable to comply with LTC Layfield's 0900 hours, 10 October 1995, battalion formation UNPREDEP mission uniform order. Appellant's civilian defense counsel did not request the military judge to give an inability instruction, but that same counsel now avers that the military judge erred by not *sua sponte* giving such an instruction. *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981). We find this assertion to be meritless for many of the same reasons stated in our resolution of his obedience to orders argument, above (*see* Assignment of Error V, Compliance with [**41] CPT Palmateer's Order to Leave the Formation).

Law

Where appellant fails to object to an instruction or to the omission of an instruction prior to the court-martial panel closing for deliberations, we review for plain error. R.C.M. 920(f). When a military judge omits a special defense instruction, the appropriate review is for harmlessness. *United*

States v. Barnes, 39 M.J. 230, 233 (C.M.A. 1994); *United States v. Palacios*, 37 M.J. 366, 368 (C.M.A. 1993).

The military judge has an affirmative *sua sponte* duty to instruct on special defenses *reasonably* raised by the evidence even without a specific request by a party. R.C.M. 920e(3); *United States v. Gillenwater*, 43 M.J. 10, 13 (1995); *United States v. Meeks*, 41 M.J. 150, 153 (C.M.A. 1994); *United States v. McMonagle*, 38 M.J. 53, 58 (C.M.A. 1993). A defense is reasonably raised when the record contains some evidence to which the court-martial panel may attach credit if it so desires. *McMonagle*, 38 M.J. at 58 (citing *United States v. Simmelkjaer*, 18 U.S.C.M.A. 406, 40 C.M.R. 118 (1969)); *United States v. Brown*, 43 M.J. 187, 189 (1995). Regardless of the defense theory of the case, the [**42] military judge has a duty to instruct if a defense is raised; any doubt whether an instruction should be given should be resolved in favor of the accused. *McMonagle*, 38 M.J. at 58 (citing *Steinruck*, 11 M.J. at 324)).

Inability "is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform ...." R.C.M. 916(i). However, "if the physical ... inability of the accused occurred through the accused's own fault or design, it is not a defense." R.C.M. 916(i) discussion; *Meeks*, 41 M.J. at 153; *United States v. Williams*, 21 M.J. 360, 362 (C.M.A. 1986). Even where a defense of inability may be available, it ceases to be available where an accused "[does] not exert sufficient effort to overcome the inability," or to take advantage of a "grace period" granted by his commander. *Williams*, 21 M.J. at 362.

"When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience." *MCM*, Part IV, para. 14c(2)(g). A mere statement of an intent to violate an order requiring future execution does not constitute [**43] disobedience of that order. *MCM*, Part IV, para. 14c(2)(g); *see*

generally United States v. Shivers, 42 C.M.R. 533, 534 (A.C.M.R. 1970); *United States v. Williams*, 18 U.S.C.M.A. 78, 39 C.M.R. 78, 80 (1968); *United States v. Stout*, 1 U.S.C.M.A. 639, 1952 CMA LEXIS 606, 5 C.M.R. 67, 70 [*746] (1952). However, as stated above, the intentional failure to take preparatory steps necessary to comply with an order can constitute disobedience. *See also United States v. Patten*, 43 C.M.R. 820, 823 (A.C.M.R. 1971).

"The requirement that the [inability] be 'through no fault of his own' is *'strictly construed'* and includes only those situations where the [inability] is 'for a reason which was out of the accused's hands.'" *United States v. Williams*, 21 M.J. at 362 (quoting *United States v. Lee*, 16 M.J. 278, 280 (C.M.A. 1983)) (emphasis added).

Discussion

The evidence did not raise the defense of inability. Appellant's claim fails because appellant had the ability to comply and failed to do so solely through his own fault and design. R.C.M. 916(i) discussion; *Meeks*, 41 M.J. at 153; *Williams*, 21 M.J. at 362. Appellant knowingly and intentionally reported to the company formation [**44] in the wrong uniform. Appellant admitted his personal knowledge of the orders issued by his military superiors concerning wear of the FYROM UNPREDEP mission uniform. Appellant knew that the uniform for both the company formation and the immediate follow-on battalion formation was the same. Appellant knew that the company formation was a necessary prerequisite to the battalion formation. As stated previously, appellant knew that he would not have the opportunity to don the appropriate FYROM UNPREDEP mission uniform for the battalion formation once he entered the company formation. When given a "grace period" to comply with the orders, appellant chose not to overcome any prior "inability"

interfering with his obeying the orders. Appellant testified that he had no intention of complying with the orders. Consequently, the military judge did not err by not *sua sponte* instructing on that special defense. *United States v. Sellers*, 33 M.J. 364, 369 (C.M.A. 1991); *Steinruck*, 11 M.J. at 324.

Instructions Conclusion

Appellant asserts that the military judge made instructional errors of constitutional dimensions and that the findings of the court-martial should therefore [**45] be set aside. We disagree. If we were to find such constitutional error, it would be appropriate to test for harmlessness. *United States v. Langley*, 33 M.J. 278, 283 (C.M.A. 1991) (citing *Rose v. Clark*, 478 U.S. 570, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986)). In the instant case, the military judge instructed the panel correctly concerning the elements of the offense. We find, contrary to appellant's assertions, that the instructions *in toto* were fair and impartial. Even were we to find that the military judge applied the wrong *mens rea* standard to the mistake defense, we would find, as the Court of Military Appeals did in *Langley*, "in light of the evidence of record, ... we have no doubt that, even if correctly instructed upon, the members would have been no more ready to find the mistake honest than they were to find it honest and reasonable." *Langley*, 33 M.J. at 283. Accordingly, even if we were to find error as alleged, we would find such error harmless and affirm.

CHALLENGE FOR CAUSE-COLONEL KWIST (AE I)

Appellant's assertion that the military judge erred by failing to grant a challenge for cause against COL Kwist is meritless.

At trial, appellant made a cursory "actual bias" [**46] challenge against COL Kwist because COL Kwist had read numerous news articles concerning appellant's case and because COL Kwist had a captain "in Macedonia on the very mission that this pertains to."[2] For the first time on appeal appellant asserts as implied bias that COL Kwist's presence on the panel "created an appearance of impartiality (sic)," because COL Kwist, by inference, gave the same order to a subordinate as appellant's battalion commanders did, to "don the UN uniform and deploy to Macedonia." Accordingly, "COL Kwist [would be] [*747] judging the propriety of his own actions while sitting in judgement of [appellant]."

A military judge's denial of a challenge for cause is reviewed for a clear abuse of discretion. *United States v. Dinatale*, 44 M.J. 325, 327 (1996); [**47] *United States v. Hamilton*, 41 M.J. 22, 25 (C.M.A. 1994); *United States v. McLaren*, 38 M.J. 112, 118 (C.M.A. 1993); *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). Military judges' determinations of causal challenges based on actual bias are given "great deference," because they are in the best position to "observe the demeanor of court members and assess their credibility during *voir dire*." *United States v. Daulton*, 45 M.J. 212, 217 (1996) (citing *White*, 36 M.J. at 287). Absent a clear abuse of discretion, "'there are few aspects of a jury trial where [an appellate court] would be less inclined to disturb a trial judge's exercise of discretion ... than in ruling on challenges for

---

[2] Appellant was represented at trial by two civilian attorneys and a military trial defense counsel. The civilian defense counsel who challenged COL Kwist for cause is also appellant's primary appellate defense counsel on this appeal.

cause.'" *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)(citation omitted).

Implied bias asserted for the first time on appeal is reviewed only for plain or obvious error. *United States v. Ai*, 49 M.J. 1, 5 (1998). The application of the concept of implied bias is limited and is a rare exception. *Chandler v. Florida*, 449 U.S. 560, 66 L. Ed. 2d 740, 101 S. Ct. 802 (1981); *United States v. Lavender*, 46 M.J. 485, 488 (1997). Precedent suggests that implied bias may exist where there is [**48] a direct nexus between the nature of the appellant or charges and the nature or status of the potential panel member: "Implied bias exists 'when most people in the same position would be prejudiced.'" *Daulton*, 45 M.J. at 217 (quoting *Smart*, 21 M.J. at 20). Testing for both actual and implied bias, we find none. The military judge did not err in denying appellant's causal challenge against COL Kwist. It is clear from the record that COL Kwist harbored no actual bias against the accused and most certainly COL Kwist did not demonstrate any bias that would not "yield to the evidence presented and the judge's instructions." *United States v. Napoleon*, 46 M.J. 279, 283 (1997) (quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)); *Dinatale*, 44 M.J. at 328.

Applying the objective standard of whether a member of the general public would doubt the "legality, fairness, and impartiality" of the court-martial, we conclude that the denial of the challenge for cause against COL Kwist plainly passes the perception of fairness test and find no implied bias. R.C.M. 912(f)(1)(N); *United States v. Minyard*, 46 M.J. 229, 231-32 (1997); *Daulton*, 45 M.J. at 217; [**49] *United States v. Harris*, 13 M.J. 288, 292 (C.M.A. 1982). Colonel Kwist merely filled a tasking from higher headquarters. He did not dictate his subordinate's uniform for the mission nor issue any orders concerning uniforms. He had no opinion on the lawfulness of the UN mission uniform. His personal involvement in the

FYROM UNPREDEP mission went to the deployment of troops (a matter decided by the military judge as an interlocutory question) rather than to the mission uniform. In summary, COL Kwist's connections to the matters challenged by appellant were professional rather than personal and were not atypical of an officer in his position. *See, e.g., Ai,* 49 M.J. at 5; *United States v. Alis*, 47 M.J. 817 (AF Ct. Crim. App. 1998).

LEGAL AND FACTUAL SUFFICIENCY (AE II)

Appellant's assertion that the evidence presented at trial was legally and factually insufficient to prove that he failed to obey a lawful order is without merit.[3] Appellant does not allege that he complied with the orders. Rather, he argues that the record [*748] is factually and legally insufficient to prove that the orders were legal. Second, he argues that his failure to comply with the orders was [**50] excused by his inability to comply as a result of his being removed from the company formation at 0845 hours, 10 October 1995. We disagree and have disposed of these issues in our determinations of Assignments of Error VII and VIII, and IV, V and VI, respectively.

Accordingly, we hold that the evidence is both legally and factually sufficient to support the findings [**51] of guilty.

---

[3] The specification as alleged permitted the court-martial panel to find appellant guilty of violating any or all of the following orders: 1) CPT Palmateer's order to wear LTC Layfield's prescribed FYROM UNPREDEP mission uniform to the 10 October 1995, company formation; 2) LTC Layfield's order to wear the FYROM UNPREDEP mission uniform to the 0900 hours, 10 October 1995, battalion formation; and 3) LTC Layfield's standing order that the FYROM UNPREDEP mission uniform was the battalion duty uniform from 0900 hours, 10 October 1995, until the end of the mission. We find the evidence legally and factually sufficient to prove each of the three orders.

Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); UCMJ art. 66(c).

MOTION FOR A FINDING OF NOT GUILTY (AE III)

Appellant's contention that the finding of guilty to the Charge and its Specification should be set aside because the military judge erred in not granting appellant's motion for a finding of not guilty is meritless. R.C.M. 917(g).

DECISION

We have carefully considered the remaining assignment of error and those matters personally asserted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. We are entirely satisfied that appellant received a fair and impartial trial. We also find that the approved sentence is appropriate. Accordingly, the findings of guilty and the sentence are affirmed.

Judge ECKER and Judge CARTER concur.

[This page intentionally blank.]

Military trial judge's pretrial rulings

(R. 422-433; 448-449)

[Transcript page 422] MJ: To ensure that it is, indeed, a part of the record, the next appellate exhibit in order would be?

CR: Eighty-nine, sir.

MJ: Appellate Exhibit LXXXIX. The document will be marked as Appellate Exhibit LXXXIX. Once again, I would indicate I believe I've seen that document.

CDC1: Yes, sir.

MJ: Very well, counsel, I will see you in this courtroom, 1500 tomorrow.

Court's adjourned.

[The Article 39(a) session recessed at 1719, 18 January 1996. The Article 39(a) session reconvened at Leighton Barracks, Wuerzburg, Federal Republic of Germany, at 1502, 19 January 1996.]

MJ: The court is called to order. Please be seated. Let the record reflect that all parties to the trial who were present at the last session are again present. I note that Captain Vanderau is still not present. Is that with Specialist New's consent?

CDC2: It is, Your Honor.

MJ: Specialist New, do you agree with that?

ACC: It is, sir.

MJ: I indicated all parties. We, of course, have the original court reporter, Mrs. Carolyn Simon, who has been [Page 423] previously sworn.

In accordance with my request, the defense provided me the uniform items in question. They have been marked as appellate exhibits and will be appended to the record.

I also did, in fact, judicially notice Army Regulation 600-1, Wear and Appearance of Army Uniforms and Insignia, dated 1 September 1992. I had the opportunity to examine the entire regulation, but since I judicially noticed the regulation, for purposes of the record, I merely inserted the first page as an appellate exhibit. That way the appellate courts, if they wish, will know precisely what I judicially noticed.

Specialist Michael G. New is charged with failing to obey a lawful order issued by Lieutenant Colonel Stephen R. Layfield on 2 October 1995, and Captain Roger H. Palmateer on 4 October 1995. The order was to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap. The accused, through counsel, now seeks to dismiss the charge and its specification on the grounds that, one, the order was unlawful, and that it was issued pursuant to an unlawful deployment of the accused; two, the order was-

unlawful as it required the unauthorized alteration of the accused's United States Army uniform; three, the order was unlawful as its effect was to subject the accused to involuntary servitude as a U.N. soldier and, in effect, placing him in involuntary [Page 424] servitude in violation of the 13th Amendment of the United States Constitution; and, fourth, the order was unlawful in that it was issued in breach of the accused's enlistment contract.

For purposes of this motion, I assumed that Specialist New failed to obey the order described in the charge and its specification.

As early as 9 July 1993, the President of the United States, the Chief Executive, and the Commander-in-Chief of the Armed Forces, hereafter the President, determined that it was in the interests of the United States to deploy combat-equipped United States armed forces as part of a multinational effort to resolve the continuing civil war in the former Yugoslavia.

Based on this determination, the President ordered the deployment of combat-equipped United States armed forces to Macedonia as part of a multinational effort to bring stability to the former Yugoslavia.

The President believed in early July 1993, and still believes, that the deployment of United States armed forces to Macedonia is important to United States foreign policy and national security interests. While the President felt his actions in deploying United States combat-equipped forces to Macedonia was consistent with United Nations Security Council resolutions evidencing multinational consensus for action in [Page 425] the region, and that his action was in accordance with Section 7 of the United Nations Participation Act, he specifically took this action pursuant to his constitutional authority as Commander-in-Chief and Chief Executive.

Beginning in early July 1993 and pursuant to the president's decision to deploy combat-equipped United States armed forces to Macedonia, United States armed forces--rather, since that time United States armed forces have been deployed continuously in Macedonia as part of the multinational peacekeeping effort in that country. Since his initial decision to deploy those troops, the President, consistent with Section 4 of the War Powers Resolution, has informed Congress of this United States armed forces action.

Specifically, Specialist New was formerly assigned to 1st Battalion, 15th Infantry, 3d Infantry Division, hereafter,

1/15th Infantry, and he was stationed in Schweinfurt, Germany. Prior to 2 October 1995, United States armed forces commanders selected 1/15th Infantry to deploy to Macedonia, beginning in October 1995, to relieve United States armed forces presently in place, and to perform peacekeeping operations consistent with the President s earlier decision to deploy combat-equipped United States armed forces to Macedonia as part of a multinational peacekeeping effort.

In preparation for an October 1995 deployment to Macedonia, Specialist New's commanders issued an order to all [Page 426] members of the command, including Specialist New, to modify his combat or battle dress uniform to add distinctive accouterments which included some United Nations accouterments. The specific modification of the uniform required the wearing of a distinctive United Nations blue headgear, the affixing on the right sleeve of a U.N. blue cloth patch, and the affixing on the left sleeve of a cloth United States flag. In all other respects, the United States Army uniform was unchanged. The modified United States combat or BDU uniform was to be worn by United States combat-equipped soldiers while performing their peacekeeping operations in Macedonia.

The wearing of distinctive uniforms or uniform accessories easily recognizable and identifiable in a combat environment or potential combat environment has a practical combat function which may enhance both the safety and/or tactical effectiveness of combat-equipped soldiers performing tactical operations. As such, the modification of 1/15th Infantry soldiers' uniforms, as described above, to include the adding of U.N. military uniform accouterments, had a function specifically designed to enhance the safety of United States armed forces in Macedonia.

The President, as Commander-in-Chief, specifically retains command authority over all United States armed forces deployed in Macedonia. Even those instances where United [Page 427] States armed forces deployed in Macedonia might be placed under the operational control of non-United states armed forces commanders, the chain of command, from the President to the United States armed forces commander in the field, remains inviolate.

At the time Specialist New's commanders ordered him to modify his uniform on 2 and 4 October 1995 in preparation for possible deployment, the President of the United States of America had already determined that the deployment of Specialist New's unit to Macedonia would also be made as a

peacekeeping operation, pursuant to Chapter VI, United Nations Charter, and that while counting his unit, less than 1,000 United States service members would be so deployed.

At all time relevant to this proceeding, the number of United States armed forces deployed pursuant to Chapter VI, as determined by the President and Commander-in-Chief of the armed forces, was less than the statutory ceiling for Chapter VI deployments of United States armed forces, as stated in Section 7 of the United Nations Participation Act.

The President, as Commander-in-Chief, specifically retains command authority over all United States armed forces deployed in Macedonia. Even in those instances where United States armed forces deployed in Macedonia might be placed under the operational control of non-United States armed forces commanders, the chain-of-command, once again, from the [Page 428] President to the United States armed forces commander in the field, remains inviolate.

Applicable Army regulations direct that the commander in charge of units or a maneuver may prescribe the uniform to be worn within the maneuver area. Applicable regulations also direct that commanders may require the wear of organizational health and safety equipment with the uniform when safety

considerations make it appropriate. These items will be furnished at no cost to the individual.

The U.N. military uniform accouterments in issue were neither gifts from a foreign government nor received by Specialist New from a foreign government, as those terms are used in any statutory or regulatory prohibition regarding a soldier's standards of conduct. Furthermore, Section 7 of the United Nations Participation Act appears to authorize the receipt of the uniform accouterments in question, as it provides: "Personnel involved in non-combatant assistance to the United Nations may accept directly from the United Nations any or all of the allowances or prerequisites to which they are entitled, and extraordinary expenses and prerequisites incident to such detail."

After having considered the issue fully, to include the documents and arguments provided by the defense in support of its position that the President's decision and subsequent deployment of combat-equipped United States armed forces to [Page 429] Macedonia is illegal, thereby making Specialist New's commanders' order to modify his United States combat uniform in preparation for deployment also illegal, the Court finds as follows:

The order issued by Specialist New's commanders on 2 and 4 October 1995 was not an order to deploy, but merely an order made in preparation for the anticipated deployment of 1/15th Infantry to Macedonia. Accordingly, any violation of that order by Specialist New on 10 October 1995 was not, in fact, a violation of an order to deploy. It did not effectively call into issue the underlying legality of the deployment.

An order to wear the prescribed uniform for deployment to Macedonia, i.e., U.N, patches and cap, is not an order which has the meaning and/or effect to deploy to Macedonia or anywhere else.

Obviously, obedience to orders is the vital principle of the military life. The fundamental rule, in peace and in war, is for all inferiors through all the grades, from General of the Army to the newest recruit. Very early, the Supreme Court recognized the essential importance of strict obedience to an effective military force. I quote: "Nor did the belief of the plaintiff as to his rights furnish any justification for his disobedience to orders, for there would be an end to all discipline if the seamen and marines [Page 430] on board a ship of war on a distant service were permitted to act upon their own opinion of their rights and to throw off the authority of the commander whenever they supposed it to be unlawfully

exercised." That's Dinsman versus Wilkes at 53 U.S. (12 How.) 389, 403 (1851).

Thus, out of necessity, military law fosters and assures unhesitating obedience to orders. Moreover, all orders are presumed to be lawful and proper. See paragraph 14(c)(2)(A)(i) of the Manual for Courts-Martial. I quote: "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. While the unlawfulness of an order is a defense to the charge of disobedience, the accused bears the heavy burden of demonstrating unlawfulness. The inherent emphasis in the military upon obedience, except in cases where the order is patently illegal, encourages compliance with orders irrespective of legality. This consequence has not gone without notice, and the law has sought to afford protection to soldiers who act pursuant to orders. The quid pro quo for fostering obedience and discouraging disobedience has been a form of immunity granted to soldiers who act in obedient compliance with illegal orders. This immunity based on faithful obedience exists except where the accused knew the orders to be unlawful, or a person of ordinary sense and understanding would have known orders to be unlawful." See [Page 431] paragraph 916(d) of the Manual.

In practice, the immunity arising out of obedience to a lawful order has given way only in extreme cases where the illegality is not doubtful. I cite you but one case for that, United States versus Calley. Calley provides ample further cites.

Thus, the Manual and the courts recognize, as a matter of justice and basic fairness, soldiers should not be instilled with a strong sense of obedience, told to obey unlawful orders only at their own peril, and at the risk of insubordination, and then prosecuted for conduct resulting from compliance.

Applying these principles and dictates to the order in question, the Court must conclude that Specialist New's commanders' orders to dress in a United States Army uniform, which includes distinctive accouterments associated with the United Nations, does not violate any provision of the United States Constitution, or any federal statute, or any contractual provision relating to the accused's status as a soldier in the United States armed forces, or amount in any way to involuntary servitude, as defined by the 13th Amendment.

The Court also finds, after listening to the testimony of Mr. David S. Sullivan and considering all the matters submitted by the defense, as well as the government, [Page 432] regarding the constitutional and/or statutory framework surrounding the decision and subsequent deployment of United States armed

forces to Macedonia, that this issue is a political question, inviting this Court to improperly review and possibly interfere with the President's activities as Commander-in-Chief in the realm of foreign affairs. This Court declines the invitation.

The Court finds there to be a textually demonstrable constitutional commitment of the issue regarding the deployment of United States peacekeepers to Macedonia to a coordinate political department or departments. The conduct of foreign relations, and specifically the nature of executive decisions affecting the conduct of those relations, is committed by the Constitution to the executive and legislative, or the political departments of the government.

The doctrine of justiciability places beyond this court issues concerning the utilization and funding of the armed forces. As United States Court of Appeals for the Armed Services recently reiterated in United States versus Huet-Vaughn, any question regarding the lawfulness or a service member's perception of the lawfulness of our government's decision to employ military forces is both irrelevant to any subsequent prosecution for disobeying an order based on that decision, and is non-justiciable.

Specialist New's belief, no matter how sincerely [Page 433] held, that the United Nations Charter is based upon

manmade human rights and principles which are incompatible with the God-given inalienable rights preserved and protected by our Constitution of the United States is entirely immaterial as to the issue of the lawfulness of the order. Good order and discipline in the armed forces cannot be predicated or held hostage to an individual soldier's views regarding such issues, or, for that matter, even upon the individual soldier's views regarding the delicate balance of power, purposely evolving and rightly debated between the Chief Executive and the legislative branches of our government.

While every citizen has the right to have an opinion regarding the matter in which the President chooses to conduct foreign policy on behalf of the people of this nation, and, in an appropriate time, place, and manner, to make that opinion known or manifest, in regards to a soldier, that freedom does not extend to taking that politic expression to the point of disobeying lawful orders of his appointed military commanders. Accordingly, the motions to dismiss filed on behalf of the accused are denied.

Now, defense, I believe, as you listen to my findings, I, once again, believe that this is an interlocutory issue solely for me, but I had promised you the opportunity to be heard, and I will give you that opportunity at this time.

CDC2: Very well, Your Honor. Thank you.

* * *

[Page 448] MJ: I have carefully considered the argument of counsel [Page 449] for both sides, and I adhere to my earlier thought that this is nothing more than an interlocutory issue. It is purely a question of law, so I will, indeed, instruct the members that, as a matter of law, the order of this case, as described in the specification, if, in fact, there was such an order, was a lawful order.

Court-Martial's Finding of guilt

United States	)	
	)	
v.	)	Findings Worksheet
	)	
Specialist Michael G. New	)	
450-73-3242, U.S. Army	)	
Headquarters and Headquarters	)	
Company, 1st Brigade, 3d Infantry	)	
Division, APO Army Europe 09226	)	

****

NOTE: After the court has reached findings, the President shall circle the findings selected.

In announcing the findings, the President will announce as follows:

"Specialist Michael G. New, this court-martial finds you:

I. IN CASE OF COMPLETE ACQUITTAL

Of the Charge and Specification: Not Guilty.

II. IN CASE OF CONVICTION OF THE CHARGE AND SPECIFICATION

(Of the Charge and Specification: Guilty)

s/President of Court-Martial

Court-Martial's Sentence of bad conduct discharge

United States	)	
	)	Sentencing Worksheet
v.	)	
	)	
Specialist Michael G. New	)	
450-73-3242, U.S. Army	)	
Headquarters and Headquarters	)	
Company, 1st Brigade, 3d Infantry	)	
Division, APO Army Europe 09226	)	

****

NOTE: After the court has reached a sentence, the President shall circle the punishment(s) selected and fill in any applicable punishment(s).

In announcing the sentence, the President will announce as follows:

"Specialist Michael G. New, this court sentences you:

1. To no punishment.

* * *

PUNITIVE DISCHARGE

8. To be discharged from the service with a bad conduct discharge.

s/President of Court-Martial

United States Constitution, Article I,
Section 9, Clause 8

Section 9, Clause 8. Titles of nobility--Presents from foreign state.

No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State.

United States Constitution, Article II,
Section 2, Clauses 1 and 2

Section 2, Clause 1. Commander in Chief--Opinions of department heads--Reprieves and pardons.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Section 2, Clause 2. Treaties--Appointment of officers.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

United States Constitution,
Amendment 13

Sec. 1. [Slavery prohibited.]

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. [Power to enforce amendment.]

Congress shall have power to enforce this article by appropriate legislation.

United Nations Charter
Chapter VI

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the

obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

United Nations Charter
Chapter VII

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remembers.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

5 USC Section 7342

Section 7342. Receipt and disposition of foreign gifts and decorations

(a) For the purpose of this section--

(1) "employee" means--

(A) an employee as defined by section 2105 of this title and an officer or employee of the United States Postal Service or of the Postal Rate Commission;

(B) an expert or consultant who is under contract under section 3109 of this title with the United States or any agency, department, or establishment thereof, including, in the case of an organization performing services under such section, any individual involved in the performance of such services;

(C) an individual employed by, or occupying an office or position in, the government of a territory or possession of the United States or the government of the District of Columbia;

(D) a member of a uniformed service;

(E) the President and the Vice President;

(F) a Member of Congress as defined by section 2106 of this title (except the Vice President) and any Delegate to the Congress; and

(G) the spouse of an individual described in subparagraphs (A) through (F) (unless such individual and his or her spouse are separated) or a dependent (within the meaning of section 152 of the Internal Revenue Code of 1954) of such an individual, other than a spouse or dependent who is an employee under subparagraphs (A) through (F);

(2) "foreign government" means--

(A) any unit of foreign governmental authority, including any foreign national, State, local, and municipal government;

(B) any international or multinational organization whose membership is composed of any unit of foreign government described in subparagraph (A); and

(C) any agent or representative of any such unit or such organization, while acting as such;

(3) "gift" means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government;

(4) "decoration" means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government;

(5) "minimal value" means a retail value in the United States at the time of acceptance of $ 100 or less, except that--

(A) on January 1, 1981, and at 3 year intervals thereafter, "minimal value" shall be redefined in regulations prescribed by the Administrator of General Services, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period; and

(B) regulations of an employing agency may define "minimal value" for its employees to be less than the value established under this paragraph; and

(6) "employing agency" means--

(A) the Committee on Standards of Official Conduct of the House of Representatives, for Members and employees of the House of Representatives, except that those responsibilities specified in subsections (c)(2)(A), (e)(1), and (g)(2)(B) shall be carried out by the Clerk of the House;

(B) the Select Committee on Ethics of the Senate, for Senators and employees of the Senate, except that those responsibilities (other than responsibilities involving approval of the employing agency) specified in subsections (c)(2), (d), and (g)(2)(B) shall be carried out by the Secretary of the Senate;

(C) the Administrative Office of the United States Courts, for judges and judicial branch employees; and

(D) the department, agency, office, or other entity in which an employee is employed, for other legislative branch employees and for all executive branch employees.

(b) An employee may not--

(1) request or otherwise encourage the tender of a gift or decoration; or

(2) accept a gift or decoration, other than in accordance with the provisions of subsections (c) and (d).

(c) (1) The Congress consents to--

(A) the accepting and retaining by an employee of a gift of minimal value tendered and received as a souvenir or mark of courtesy; and

(B) the accepting by an employee of a gift of more than minimal value when such gift is in the nature of an educational scholarship or medical treatment or when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States, except that--

(i) a tangible gift of more than minimal value is deemed to have been accepted on behalf of the United States and, upon acceptance, shall become the property of the United States; and

(ii) an employee may accept gifts of travel or expenses for travel taking place entirely outside the United States (such as transportation, food, and lodging) of more than minimal value if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency and any regulations which may be prescribed by the employing agency.

(2) Within 60 days after accepting a tangible gift of more than minimal value (other than a gift described in paragraph (1)(B)(ii)), an employee shall--

(A) deposit the gift for disposal with his or her employing agency; or

(B) subject to the approval of the employing agency, deposit the gift with that agency for official use.

Within 30 days after terminating the official use of a gift under subparagraph (B), the employing agency shall forward

the gift to the Administrator of General Services in accordance with subsection (e)(1) or provide for its disposal in accordance with subsection (e)(2).

(3) When an employee deposits a gift of more than minimal value for disposal or for official use pursuant to paragraph (2), or within 30 days after accepting travel or travel expenses as provided in paragraph (1)(B)(ii) unless such travel or travel expenses are accepted in accordance with specific instructions of his or her employing agency, the employee shall file a statement with his or her employing agency or its delegate containing the information prescribed in subsection (f) for that gift.

(d) The Congress consents to the accepting, retaining, and wearing by an employee of a decoration tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance, subject to the approval of the employing agency of such employee. Without this approval, the decoration is deemed to have been accepted on behalf of the United States, shall become the property of the United States, and shall be deposited by the employee, within sixty days of acceptance, with the employing agency for official use or forwarding to the Administrator of General Services for disposal in accordance with subsection (e)(1), or for disposal in accordance with subsection (e)(2).

(e) (1) Except as provided in paragraph (2), gifts and decorations that have been deposited with an employing agency for disposal shall be (A) returned to the donor, or (B) forwarded to the Administrator of General Services for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 [*40 USCS Section 471* note]. However, no gift or decoration that has been deposited for disposal may be sold without the

approval of the Secretary of State, upon a determination that the sale will not adversely affect the foreign relations of the United States. Gifts and decorations may be sold by negotiated sale.

(2) Gifts and decorations received by a Senator or an employee of the Senate that are deposited with the Secretary of the Senate for disposal, or are deposited for an official use which has terminated, shall be disposed of by the Commission on Arts and Antiquities of the United States Senate. Any such gift or decoration may be returned by the Commission to the donor or may be transferred or donated by the Commission, subject to such terms and conditions as it may prescribe, (A) to an agency or instrumentality of (i) the United States, (ii) a State, territory, or possession of the United States, or a political subdivision of the foregoing, or (iii) the District of Columbia, or (B) to an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 [*26 USCS Section 501*(c)(3)] which is exempt from taxation under section 501(a) of such Code [*26 USCS Section 501*(a)]. Any such gift or decoration not disposed of as provided in the preceding sentence shall be forwarded to the Administrator of General Services for disposal in accordance with paragraph (1). If the Administrator does not dispose of such gift or decoration within one year, he shall, at the request of the Commission, return it to the Commission and the Commission may dispose of such gift or decoration in such manner as it considers proper, except that such gift or decoration may be sold only with the approval of the Secretary of State upon a determination that the sale will not adversely affect the foreign relations of the United States.

(f) (1) Not later than January 31 of each year, each employing agency or its delegate shall compile a listing of all statements filed during the preceding year by the employees of that agency pursuant to subsection (c)(3) and shall transmit such listing to the Secretary of State who shall publish a comprehensive listing of all such statements in the Federal Register.

(2) Such listings shall include for each tangible gift reported--

(A) the name and position of the employee;

(B) a brief description of the gift and the circumstances justifying acceptance;

(C) the identity, if known, of the foreign government and the name and position of the individual who presented the gift;

(D) the date of acceptance of the gift;

(E) the estimated value in the United States of the gift at the time of acceptance; and

(F) disposition or current location of the gift.

(3) Such listings shall include for each gift of travel or travel expenses--

(A) the name and position of the employee;

(B) a brief description of the gift and the circumstances justifying acceptance; and

(C) the identity, if known, of the foreign government and the name and position of the individual who presented the gift.

(4) In transmitting such listings for the Central Intelligence Agency, the Director of Central Intelligence may delete the information described in subparagraphs (A) and (C) of paragraphs (2) and (3) if the Director certifies in writing to the Secretary of State that the publication of such information could adversely affect United States intelligence sources.

(g) (1) Each employing agency shall prescribe such regulations as may be necessary to carry out the purpose of this section. For all employing agencies in the executive branch, such regulations shall be prescribed pursuant to guidance provided by the Secretary of State. These regulations shall be implemented by each employing agency for its employees.

(2) Each employing agency shall--

(A) report to the Attorney General cases in which there is reason to believe that an employee has violated this section;

(B) establish a procedure for obtaining an appraisal, when necessary, of the value of gifts; and

(C) take any other actions necessary to carry out the purpose of this section.

(h) The Attorney General may bring a civil action in any district court of the United States against any employee who knowingly solicits or accepts a gift from a foreign government not consented to by this section or who fails to deposit or report such gift as required by this section. The court in which such action is brought may assess a penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $ 5,000.

(i) The President shall direct all Chiefs of a United States Diplomatic Mission to inform their host governments that it is a general policy of the United States Government to prohibit United States Government employees from receiving gifts or decorations of more than minimal value.

(j) Nothing in this section shall be construed to derogate any regulation prescribed by any employing agency which provides for more stringent limitations on the receipt of gifts and decorations by its employees.

(k) The provisions of this section do not apply to grants and other forms of assistance to which section 108A of the Mutual Educational and Cultural Exchange Act of 1961 [*22 USCS § 2458a]* applied.

10 USC Section 851

Section 851. Art. 51. Votings and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title [10 USCS Section 852] (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them--

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

10 USC Section 892

Section 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter [10 USCS Sections 801 et seq.] who--

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

22 USC Section 287d

Section 287d. Use of armed forces; limitations

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That, except as authorized in section 7 of this Act [*22 USCS Section 287d-1*], nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

22 USC Section 287d-1

Section 287d-1. Noncombatant assistance to United Nations

(a) Armed forces details; supplies and equipment; obligation of funds; procurement and replacement of requested items. Notwithstanding the provisions of any other law, the President, upon the request by the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such requests, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter--

(1) the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time: Provided, That while so detailed, such personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the United States, credit for longevity and retirement, and all other perquisites appertaining to such duty: Provided further, That upon authorization or approval by the President, such personnel may accept directly from the United Nations (a) any or all of the allowances or perquisites to which they are entitled under the first proviso hereof, and (b) extraordinary expenses and perquisites incident to such detail;

(2) the furnishing of facilities, services, or other assistance and the loan of the agreed fair share of the United States of any supplies and equipment to the United Nations by the National Military Establishment [Department of Defense], under such terms and conditions as the President shall determine;

(3) the obligation, insofar as necessary to carry out the purposes of clauses (1) and (2) of this subsection, of any funds appropriated to the National Military Establishment [Department of Defense] or any department therein, the procurement of such personnel, supplies, equipment, facilities, services, or other assistance as may be made available in accordance with the request of the United Nations, and the replacement of such items, when necessary, where they are furnished from stocks.

(b) Reimbursement from United Nations; waiver of reimbursement. Whenever personnel or assistance is made available pursuant to the authority contained in subsection (a)(1) and (2) of this section, the President shall require reimbursement from the United Nations for the expense thereby incurred by the United States: Provided, That in exceptional circumstances, or when the President finds it to be in the national interest, he may waive, in whole or in part, the requirement of such reimbursement: Provided further, That when any such reimbursement is made, it shall be credited, at the option of the appropriate department of the National Military Establishment [Department of Defense], either to the appropriation, fund, or account utilized in incurring the obligation, or to an appropriate appropriation, fund, or account currently available for the purposes for which expenditures were made.

(c) Additional appropriation authorizations. In addition to the authorization of appropriations to the Department of State contained in section 8 of this Act [*22 USCS Section 287e*], there is hereby authorized to be appropriated to the National Military Establishment [Department of Defense], or any department therein, such sums as may be necessary to reimburse such Establishment [Department of Defense] or department in the event that reimbursement from the United

Nations is waived in whole or in part pursuant to authority contained in subsection (b) of this section.

(d) Disclosure of information. Nothing in this Act [*22 USCS Sections 287* et seq.] shall authorize the disclosure of any information or knowledge in any case in which such disclosure is prohibited by any other law of the United States.

Army Regulation 670-1
Part Two – Utility and Selected Organization Uniform
Chapter 3 – Temperate and Hot Weather Battle
Dress Uniforms [Selected sections]

3-1. Authorization for wear

The temperate and hot weather battle dress uniforms (BDUs) are authorized for year-round wear by all personnel when prescribed by the commander.

3-3. Occasion for wear

BDUs may only be worn on duty when prescribed by the commander. They are not for travel, nor for wearing off military installations except in transit between the individual's quarters and duty station. See paragraph 2–6c for exceptions to this policy. These uniforms are issued as utility, field, training, or combat uniforms and are not intended to be worn as all–purpose uniforms when other uniforms are more appropriate.

3–4. Insignia and accouterment

Insignia and accouterments authorized for wear with these uniforms are—

a. Badges (subdued).

(1) Combat and special skill badges (pin on or embroidered) (para 28–17a).

(2) Special skill tabs (para 28–17c).

(3) Subdued identification badges (para 28–18i through m).

b. Brassards (para 27–27).

c. Branch insignia (paras 27–10b and 27–12b).

d. Combat Leaders Identification (para 27–20).

e. Distinctive infantry insignia (para 27–28).

f. Grade insignia (paras 27–5, 27–6, and 27–7).

g. Headgear insignia (para 27–3).

h. Subdued shoulder sleeve insignia, current organization (para 27–16e(2)).

i. Subdued shoulder sleeve insignia, former wartime service (para 27–17c(2)).

j. Name and U.S. Army distinguishing tapes (paras 27–22a and 27–22b).

k. Foreign badges, distinctive unit insignia, and regiment distinctive insignia will not be worn on these uniforms.

Appellate Exhibit IV

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF LEGISLATIVE LIAISON
1600 ARMY PENTAGON
WASHINGTON, DC 20310-1600

[SEAL]
SALL-IL 5 October 1995

INFORMATION PAPER

SUBJECT: Authority to Deploy a U.S. Army Unit to the Former Yugoslav Republic of Macedonia

1. PURPOSE. To respond to inquiries concerning the legal basis to deploy U.S. Army units to the Former Yugoslav Republic of Macedonia (FYROM) as the United States contingent to the on-going United Nations Preventive Deployment Force (UNPREDEP).

2. SUMMARY.

a. U.S. participation in UNPREDEP is authorized by law and the Constitution.

b. U.S. soldiers remain under U.S. command and retain the right of self-defense.

c. An order to deploy and wear U.N. beret and patch is a lawful order

3. FACTS.

a. Since 1992, the United Nations (U.N.) Security Council has authorized a U.N. peacekeeping force to deploy to FYROM. The force's mission is to observe the border and discourage, by its presence, the spread of hostilities into

FYROM (a "preventive deployment"). U.S. Army forces have participated in this mission as Task Force Able Sentry since July 1993. The U.S. units supporting this mission typically deploy for a period of 179 days. In early November 1995, a unit from the U.S. Army 3d Infantry Division will relieve the Army unit currently supporting the UNPREDEP mission.

b. Section 2, Clause 1, Article II of the U.S. Constitution establishes the President of the United States as the Commander in Chief of the Army and Navy. As Commander in Chief, the President has both the constitutional and statutory authority to employ the armed forces in order to further U.S. national interests. This authority includes providing assistance to the U.N. in order to maintain international peace end security. By statute--Section 7 of the United Nations Participation Act (22 US Code 217d-l)–the President may detail U.S. military personnel to U.N. peacekeeping operations authorized under Chapter VI of the U.N. Charter to serve as observers, guards, or in any other noncombatant capacity. Further, under Section 628 of the Foreign Assistance Act of 1961, upon appropriate Presidential determination, U.S. personnel may be assigned or detailed to international organizations to serve with the international staff of such organizations or to provide technical, scientific, or professional services to them. UNPREDEP was established as a peacekeeping operation under Chapter VI of the U.N. Charter, therefore, the presence of U.S. troops serving in FYROM is authorized by law.

c. In agreeing to commit forces to a U.N. peacekeeping operation approved by the Security Council, the President may place forces under the temporary operational or tactical *control* of a competent U.N. commander for specific operations authorized by the Security Council. However,

even when this prerogative is exercised, the chain of *command* between the President and the U.S. commanders of such units remains inviolate. Thus, the President retains and will never relinquish [Page 2] *command* over U.S. forces. The greater the U.S. military role, the less likely it will be that the president will decide to place U.S. forces under the overall operational *control* of a U.N. commander. Any large scale participation of U.S. forces in a major peace enforcement mission that is likely to involve combat would ordinarily be conducted under U.S. *command and operational control* or through competent regional organizations such as NATO or ad hoc coalitions.

d. In the event of a deployment under the operational *control* of a competent U.N. commander, the President will carefully structure the limits of control that may be exercised. Within the limits of operational control, a foreign commander cannot: modify the basic mission under which U.S. forces were assigned to a U.N. force; deploy U.S. personnel outside the mission area; separate U.S. units or divide their supplies; change their internal organization; administer discipline; or otherwise exercise administrative control over the assigned U.S. forces. Importantly, the fundamental elements of U.S. command always apply. U.S. commanders maintain the authority to report separately to higher U.S. military headquarters, and will refer to higher U.S. authorities orders that are illegal under U.S. or international law, or outside the mandate of the mission to which the U.S. agreed with the U.N. In addition, U.S. forces always retain the right to act unilaterally to ensure their own safety.

e. UNPREDEP operations are conducted under U. N. auspices by a multinational military force currently commanded by a Norwegian general officer who exercises

operational *control* over Task Force Able Sentry. Command of this U.S. task force remains in a U.S. chain of command which runs from the task force commander (U.S. Army Lieutenant Colonel) to Commander, Joint Task Force Provide Promise (U.S. Navy 4-star Admiral), to CINCEUR (U.S. Army 4-star General), and ultimately to the President.

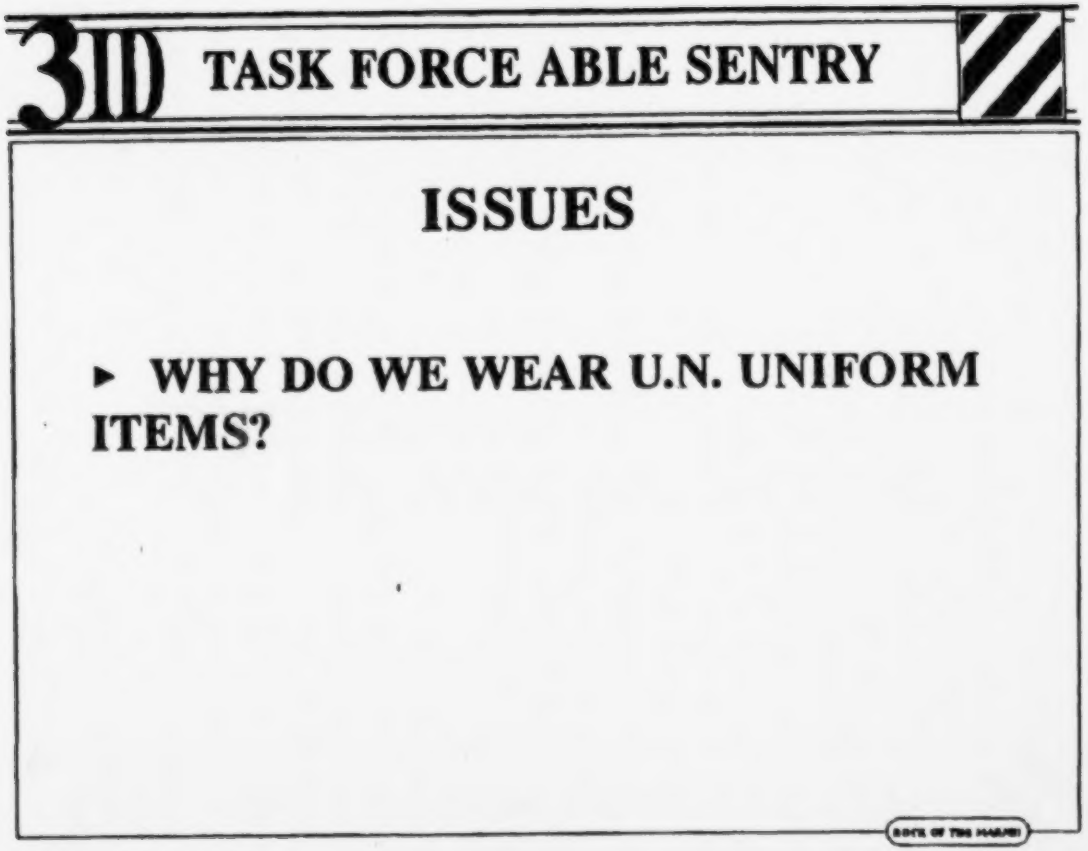
f. No U.S. soldier ordered to deploy as part of Task Force Able Sentry to FYROM will be required to execute any oath of allegiance to the U.N. The oath of enlistment executed by all soldiers to "support and defend the Constitution of the United States against all enemies foreign and domestic" and to "obey the orders of the president of the United States and the orders of the officers appointed over [the soldier]" is in full force and in no way changed by participation in this mission. An order to deploy as part of Task Force Able Sentry does not and will not operate as an involuntary transfer of allegiance from the U.S. Constitution to the U.N. Charter. Until a U.S. soldier is discharged from military service, he or she remains a U.S. soldier, subject to the entire oath of military service. Neither the deployment on a mission in support of the U.N. determined by the Commander in Chief to be in the best interest of the U.S., nor an augmentation of the U.S. Army uniform by the U.N. light blue beret and patch, will alter this commitment.

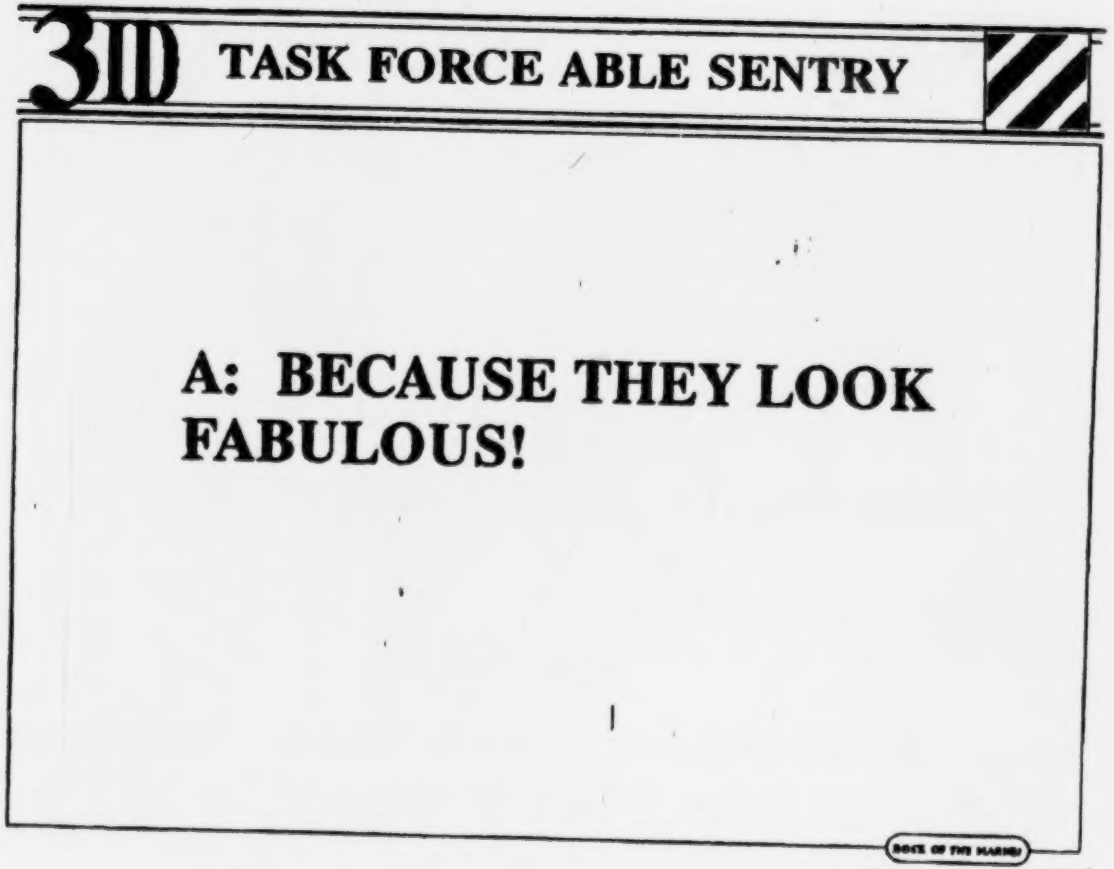
g. Troop Contributing Nations (TCNs) participating in a U.N. peacekeeping operation agree to the U.N. Guidelines established for that operation. These Guidelines are intended to ensure uniformity and enhance interoperability among the TCNs. It is these Guidelines agreed to by the United States that specify the manner in which a national uniform is to be augmented by U.N. emblems for the UNPREDEP mission. The wearing of a light blue beret or helmet and shoulder patch with the U.S. Army uniform makes U.S. personnel

readily identifiable as members of the international peacekeeping force. For safety and security reasons, it is imperative that U.S. forces be recognized, as such, by potential warring parties and the other members of national contingents participating in the mission. The blue beret and patch accomplish this purpose.

Appellate Exhibit VII
JAG Information Briefing Excerpt

APPELLATE EXHIBIT VII 1 OF 26


3ID
TASK FORCE ABLE SENTRY
ISSUES
▸ WHY DO WE WEAR U.N. UNIFORM ITEMS?


3ID
TASK FORCE ABLE SENTRY
A: BECAUSE THEY LOOK FABULOUS!
ROCK OF THE MARNE

Appellate Exhibit X
Troop Contributing Nations – Aide Memoire
November 1994
Pages 6-7 – 6-8

LOCAL RESOURCES

623. Force Headquarters will make arrangements for the use of local resources. If a battalion requires contractual services, the Commanding Officer should forward his request to Force Headquarters. Contracts for services, supplies, equipment and other requirements will be made only through the Chief Administrative Officer. Such matters are to include procurement of:

a. Accommodation,
b. Petroleum, oil and lubricants (POL) (including certain aviation fuels),
c. Fresh rations, (see NOTE, below)
d. Water supply,
e. Rentals, i.e., accommodation or equipment,
f. Public service facilities,
g. Civilian labour,
h. Garbage disposal,
i. Hair cutting*,
j. Shoe repair*,
k. Tailoring*, and
l. Laundry and cleaning

* May be difficult to obtain for the forward areas; therefore, units should be prepared accordingly.

NOTE: Bread is the only item of food which can be procured locally under normal circumstances. If a contingent requires particular types of bread not

generally available or flour for bread making, for example, black bread or oat flour, notice of these requirements, together with exact details of the product required should be given to the SPMS food office three (3) weeks before arrival in the Mission Area.

CLOTHING

624. All personnel should be fully equipped in accordance with their national scales of issue including helmets and protective body armour. Since the weather may vary from hot and dry to cold and wet, the appropriate range of items of clothing should be provided. The cost estimates of the Force will contain provision for reimbursing the TCNs for personal clothing, gear and equipment issued by them to their troops at a standard rate of $65 per man-month and $5 per man-month for personal weaponry and ammunition. (See Annex D to this chapter and paragraph 214).

625. The U.N. will tike responsibility for providing the following items of clothing to all ranks:

SER	QTY	ITEMS
(a)	(b)	(C)
1	1	Beret (UN Blue)
2	1	Field Cap (UN Blue)
3	1	Metal Hat Badge (UN)
4	1	Cloth Shoulder Patch (UN)
5	2	Armlet (Olive Drab)
		NOTE: On request of contingent
6	1	Scarf (UN Blue)

626. The UN will send to the troop contributor a minimum amount of berets, scarves, metal hat badges and shoulder patches to ensure that each individual may be given an initial

issue. Subsequent issue of these items, including on rotation, will be made in the field. It is imperative that FOD, UN New York be informed soonest of address to which the initial issue is to be air freighted. The purpose of this is for the troops assigned to UNPROFOR to arrive in the Mission Area dressed as United Nations troops.

PERSONAL IDENTIFICATION

627. While in transit to and from the Mission Area, contingent personnel must be in possession of identification in accordance with their national regulations. On arrival, the personnel will be issued a UN peace-keeping force identification card which will be the only identity document required within the area of operation. To expedite the issue of the UN identity card, each individual must carry a minimum of four (4) recent passport size photographs approximately 3cm x 3cm.

PERSONAL BELONGINGS

628. On arrival in the Mission Area, personal belongings must not include private weapons. Also, when the members of UNPROFOR leave the Mission Area, they cannot be in possession of a private weapon. UNPROFOR will not issue certificates dealing with the export of private weapons.

RATIONS

629. The contingent must carry a minimum of 30 days supply of composite rations to include brick water. Contingents deploying to areas where normal resupply is frequently disrupted such as SARAJEVO or the BIHAC POCKET should bring sufficient for 60 days. Contingents must ensure they arrive with sufficient refrigerated containers for the

strength to include detachments, observation posts and all locations where food storage will be required. These should be equipped with a suitable power source as recommended by Engineering Service.

Record Pages 345-49 — Testimony of David Sullivan
(Summary of findings re UN Operation in FYROM)

[Page 345] CDC1: All right, sir. The 97 Security Council resolutions involve UNPROFOR, including 13 Secretary General reports, one of which has been made a part of the record by the prosecution. Twenty-seven specifically refer to UNPROFOR as a Chapter VII mandate. Not a single--not one Security Council resolution mentions Chapter VI.

TC: Your Honor, may I cross-examine the witness?

MJ: You will be allowed to do that.

Now, Mr. Ray, do you have any further questions of Mr. Sullivan before I give trial counsel the opportunity to cross-examine?

CDC1: One question.

Q. Is UNPROFOR a Chapter VI or a Chapter VII mandate, based on your review of 97 Security Council resolutions and the President's letter, who says, on July the 9th 1993, he says it's a Chapter VI. Is it VI or VII? Is the President correct or incorrect?

A. According to the criteria established by the State Department legal advisor for determining the mandate of a U.N. peace operation, you must look to the U.N. Security Council resolution or resolutions that describe the purpose, and mission, and mandate of the force. Having examined 97 U.N. Security Council resolutions that pertain to the former Yugoslavia between the year 1991 and 19--end of 1995, which we believe to be the entire corpus of all such U.N. Security [Page 346] Council resolutions, to include 13 U.N. Secretary General reports--some of which we may have missed, but we're not sure--we find that 27 of the 97 resolutions, which are the criteria for establishing the mandate, say that UNPROFOR is a Chapter VII mandated operation; further, that UNPROFOR (Macedonia) is part of UNPROFOR and, therefore, is a Chapter VII operation; and, specifically, because 815 says that

UNPROFOR in all its missions have a mandate of Chapter VII. There is not a mention whatsoever in any of the 97 resolutions, or in any of the U.N. Secretary General reports, to Chapter VI whatsoever. On the basis of that evidence--this is not an opinion; this is--having studied that evidence--

TC: Objection.

A. --which is now available to the trial counsel, there are no references to Chapter VI. You cannot make up a Chapter VI mandate, as the government seems to have done--

TC: Objection.

MJ: Noted.

Q. I'd ask you to identify the--is it LXIII?

MJ: Appellate Exhibit LXIII.

Q. --Appellate Exhibit LXIII for the court.

CDC1: Do you have that?

MJ: I have that.

CDC1: You have it, sir?

MJ: Yes.

[Page 347]

CDC1: Could he identi--just review that for identification purposes? This does not have a--the little clip broke.

[Appellate Exhibit LXIII was handed to the witness.]

A. This constitutes 29 pages of analysis that is reflected in these charts, plus all of the 97 U.N. Security Council resolutions that pertain to the former Yugoslavia--which have been provided.

CDC1: The analysis was made available in a supplemental brief, but the analysis did not include the U.N. letter, nor has all of the Security Council resolutions--97 of them--been made a part of the record.

I appreciate the opportunity to explain the significance of the President's letter.

Q. What's the significance of the difference between a Chapter VI and a Chapter VII--

A. A Chapter VI--

Q. --U.N. Charter military operation?

A. A Chapter VI operation is based upon a benign environment where a truce has been agreed to between warring parties, and U.N. observers are invited in to make sure that that truce is upheld. And the U.S. participation in Chapter VI operations under Section 7 of the U.N. Participation Act states that up to a thousand American troops can be so deployed as observers, non-combatants, or guards in Chapter VI [Page 348] operations, but not in Chapter VII operations. They are specifically precluded by statutory language in Section 7 from participating in Chapter VII operations.

Q. Does the role of the Congress differ between a Chapter--U.N. Charter, Chapter VI operation from a U.N.--

A. Yes.

Q. --Charter, Chapter VII military operation?

A. Yes. Chapter VII operations are much more--much less benign. They involve threats to the peace. That's the title of Chapter VII, and actions to take when there are threats to the peace. In particular, Articles 42 and 43 of Chapter VII talk about some very forceful military actions that can be part of U.N. peacekeeping operations under Chapter VII.

And, by the way, the term "U.N. peacekeeping operations" includes both Chapter--includes Chapter VII as the mandate for peacekeeping operations. We have three U.N. Security Council resolutions that refer to U.N. peacekeeping operations as Chapter VII operations, so, to make a distinction between peacekeeping and peace enforcement is irrelevant because both peacekeeping and peace enforcement are covered under Chapter VII of the U.N. Charter.

Q. Under--

A. Now, the difference between the two sections of the U.S. law is important. Section 7 contains a pre-delegation of

[Page 349] authority from Congress to the President to deploy up to 1,000 U.S. troops as non-combatants, guards, and observers anywhere in the world in specifically Chapter VI operations. And so Congress has already agreed to that kind of deployment for up to a thousand men at any one time.

In the case of Chapter VII operations, Section 6 of the U.N. Participation Act has specifically reserved for Congress the right to give prior approval by statute or Act of Congress before any U.S. troops can participate in Chapter VII operations.

Q. Has Congress given approval for UNPROFOR (Macedonia)?

A. No. Congress has not given approval for UNPROFOR (Macedonia), specifically, as is required by law, Section 6 of the U.N. Participation Act.

CDCl: No further questions.

CROSS-EXAMINATION

Questions by Captain Klein:

Q. Mr. Sullivan, you did, indeed, write about a 25-page explanation of what you've testified here today, did you not?

A. I did.

Q. And that was included as part of the defense's supplemental discovery--supplemental response, was it not?

A. It was, except this--this document is now 29 pages, and it includes analysis of the four presidential letters that

Record Pages 442-44 — Argument of Defense Counsel
(Fact Issues which render lawfulness of order a jury issue)

[Page 442] as a military judge in any other case and what you are doing in this case and, for those reasons stated, and none of those reasons nearly as well stated as the military judge himself, the government believes your decision is a correct one and asks that you stick to it.

MJ: Mr. Hamilton?

CDC2: Your Honor, first of all, I'd note that Graf–an Article 92 offense was not even in view. This basically says that, even though you're not appointed for life, although you have been on the bench quite a while, Your Honor--

MJ: I'm grayer and I have much in the way of less hair than I used to.

CDC2: --it says that you're--you're--you have the power to adjudicate, and Calley was a murder case, a violation of war crimes.

I indicated on rebuttal, after--I indicated that I'd like to give some rebuttal. Here's what I believe some facts are in view. Here are some facts that have to be considered in why this is a factual issue, noting again that the same regulation--or the same benchbook provision which talks about interlocutory matters for Article 92 also gives an instruction that the jury has to decide matters of fact with respect to lawfulness so, obviously, it's not something that occurs all the time.

Here's some facts with regard to the unlawful [Page 443] deployment: Is there a U.N. resolution which authorizes a Chapter VI deployment? Is there a U.N. resolution which authorizes a Chapter VII deployment? Did President Clinton err? Or did he deceive Congress in representing Macedonia as a Chapter VI deployment? Of the 13 resolutions cited by the government, do seven of them refer to this as a Chapter VII deployment? And do any of them refer to this as a Chapter VI deployment anywhere? Of the 97 resolutions from the U.N., do

any of them in any place refer to this as a Chapter VI deployment? Did Congress approve this as a Chapter VII deployment?

Your Honor, however, has--as I understand your ruling, has basically said the deployment issue is off the table because of justiciability, and we've been through that the last time I was in Germany, and spare the recurring arguments on Huet-Vaughn, a case that I had read more times than I want to. I will not address the contract issue or the 13th Amendment motion; however, one of our motions had to do with the uniform, and there are clearly facts here which a fact finder needs to consider, such as: Is there a regulation which prohibits wearing the U.N. insignia? Is the order Specialist New received consistent with AR 670-1? Was Specialist New's uniform in conformity with AR 670-1? Did Specialist New's uniform have a military function? Was this a maneuver area--Macedonia? Did the U.N. uniform enhance [Page 444] safety? If the order to Specialist new was not part of an order to deploy, is there a military purpose to the order? Now, those are not questions of law. What I am suggesting, Your Honor, is that, as we take our argument to dismiss from the Constitution, foreign decorations, down to the statute, certainly, at some point, at the point of the regulation, this is no longer a question of law. This is a question of fact--more facts than law. In fact, the only law involved is judicial notice of a regulation, and juries apply facts to regulations. So, notwithstanding the constitutional aspects of the uniform, certainly, this becomes, if you cut it off at the regulation level--at the regulation--I'm not talking about statutes, I'm not talking about CFRs, I'm not talking about the Constitution--this, then, becomes a factual issue, so we'd ask that Your Honor would not instruct the members that, as a matter of law, this is a lawful order with respect to the existence of AR 670-1. That's for them, as a matter of fact, to determine. Lawfulness is a matter of fact for them to determine in this situation. The questions that I have read to Your Honor--

we believe the whole thing should go to the jury but, certainly--certainly, the regulation and below should go to the jury. It gives us some room to do something here other than stand mute. So we would ask Your Honor to, not conceding the rightness of your order, we would ask you to take a look at whether these are factual questions that a jury

Record Pages 407-09 — Prosecution Argument
("Safety" purpose and "maneuver" area under AR 670-1)

[Page 407] recognition, award from a foreign government? Absolutely not.

But, again, assume for argument's sake that this is a decoration and it was accepted from a foreign government. The key language in Article 1, Section 9, is that "none of this will happen without the consent of Congress." You will not receive titles of nobility, awards, decorations, emoluments--none of that will occur without the consent of Congress. Well, Your Honor, what do we know? What do we know from the defense's own expert that they brought over here today? We know that there is congressional consent because we know there has been no congressional action to the contrary.

A term very familiar with the military judge and in legal circles is the concept of constructive notice, constructive consent, constructive whatever. That term "constructive" is informative. By not denying this action, our Congress, who funds the individual soldier and funds that deployment, is constructively consenting to that deployment and everything that goes along with it, to include the wear of the specified uniform. What evidence is there that Congress does not consent to the wear of those uniform items? None.

Now, they also allege a regulatory infirmity under the Army Regulation 670-1. Your Honor, in 670-1, there are two crystal-clear provisions in there: paragraphs 1-18 and 2-6(d). Paragraph 2-6(d) gives a commander the authority to designate the uniform in the maneuver area. Colonel Layfield, [Page 408] by any measure, is a commander. Macedonia, by any measure, is a maneuver area. Right there, you have authorization.

Paragraph 1-18 authorizes the wear of protective or reflective items that will safeguard the soldier or add to the morale, discipline of the unit. What, if not a protective shield,

is the U.N. blue, notwithstanding the terrible invocation of what happened to Lieutenant Colonel Higgins? That one tragic incident does not make the rule. What is obvious to anybody in this courtroom is the fact that the wearing of blue in a hostile environment--and the government does not concede Macedonia is a hostile environment--but, for argument's sake, the wearing of blue in a hostile environment is the best protection one can have from the boundless chaos of warfare. It is some protection. It may not be perfect, but it is certainly some protection for that wearer, because they are clearly identified by those markings, that blue, that they are recognized internationally as off limits to the combatants.

Now, of course, in Macedonia, we don't have that situation. Again, the witness who took the stand--no indication that Macedonia or Serbia are at war and, indeed, there is no evidence presented before this court that there have been any hostilities between these two nations, former members of the same nation--whatever you want to consider them now. Absolutely clear that 1-18 in 670-1 is authority to wear [Page 409] the distinctive blue of the United Nations-sponsored operation.

Now, although the defense did bring it up in their argument--certainly, they did in their written argument, and don't forget it, Your Honor--is this idea that, somehow, Specialist New would be subjecting himself to criminal or civil penalty if he put on these patches; that, somehow, the government, under Article 134 of the Uniform Code of Military Justice, or under some appropriate civil statute, could criminally try him or fine him for wearing these things. It's a ridiculous argument. They didn't mention it in this courtroom because it doesn't deserve to be mentioned in this courtroom, but, Your Honor, don't be buffaloed by it. Consider it; consider their assertion; consider the government response.

Mr. Ray made the assertion that you can't accomplish the mission if you wear this uniform; that all

soldiers know this. Well, the government would suggest that Mr. Ray doesn't understand the state of affairs that we are faced with in 1996; that soldiers do perform peacekeeping operations, and that an integral part of that for their own protection and identity is the wear of the United Nations blue. He blinks reality if he thinks that only to close with and destroy the enemy by violence or stealth is the mission of a soldier in today's Army. He's out of touch. Common experience tells us

Defense Exhibit P (Appellate Exhibit LXXXI)

UNITED STATES	)	
	)	
v.	)	
	)	STIPULATION OF FACT
MICHAEL G. NEW	)	
SPC, US Army	)	
450-73-3242	)	
HHC, 1st Bde, 3d ID	)	
APO AE 09226	)	DATE: 9 January 1996

It is hereby stipulated by and between Trial Counsel and Defense Counsel, with the express consent of the accused, SPC Michael G. New, 450-73-3242, HHC, 1st Bde, 3d ID, that the following facts are true and susceptible of proof:

1. The United Nations insignia and accouterments -- to wit: Field Cap (UN Blue), and Cloth Shoulder Patch (UN) -- that SPC New, was ordered (by LTC Stephen R. Layfield on 2 OCT 95, and CPT Roger H. Palmateer on 4 OCT 95) to wear on his U.S. Army battle dress uniform (BDU) while deployed in Task Force Able Sentry, are <u>not</u> available for purchase, and <u>cannot</u> be purchased, at Military Clothing Sales.

2. The other United Nations insignia and accouterments -- to wit: Beret (UN Blue), Armlet (Olive Drab), and Scarf (UN Blue) -- at one time issued to SPC New (again for wear on his U.S. Army battle dress uniform (BDU) while deployed in Task Force Able Sentry) are also <u>not</u> available for purchase, and <u>cannot</u> be purchased, at Military Clothing Sales.

3. Additionally, the Metal Hat Badge (UN) that, although not part of his initial U.N. issue, would have been issued to

SPC New at Camp Able Sentry, in Macedonia, is also not available for purchase, and cannot be purchased, at Military Clothing Sales.

4. The United Nations insignia and accouterments -- to wit: Beret (UN Blue), Field Cap (UN Blue), Scarf (UN Blue), Armlet (Olive Drab), Cloth Shoulder Patch (UN), Metal Hat Badge (UN), and in particular the design of the Cloth Shoulder Patch (UN) that SPC New was ordered (by LTC Layfield and CPT Palmateer) to wear on his shoulder -- has not been approved by the Director of The Institute of Heraldry, U.S. Army, as required and mandated under the provisions of paragraphs 27-16a and b of Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia."

5. The United Nations insignia and accouterments -- to wit: Beret (UN Blue), Field Cap (UN Blue), Scarf (UN Blue), Armlet (Olive Drab), Cloth Shoulder Patch (UN), Metal Hat Badge (UN), and the design of the Cloth Shoulder Patch (UN) -- are not prescribed or listed in the Common Table of Allowance (i.e., CTA 5900).

[Page 2] 6. Both the Department of Defense and Department of the Army have not authorized ~~(by way of directive, policy, recommendation, guidance, order, or in any other way whatsoever~~, either formally or informally) the United Nations insignia and accouterments -- to wit: Beret (UN Blue), Field Cap (UN Blue), Scarf (UN Blue), Armlet (Olive Drab), Cloth Shoulder Patch (UN), Metal Hat Badge (UN), and the design of the Cloth Shoulder Patch (UN).

7. The United Nations uniform consists of all of the following items (insignia and accouterments, etc.), or combinations thereof:

a. Beret (UN Blue);
b. Field Cap (UN Blue);
c. Metal Hat Badge (UN Blue);
d. Cloth Shoulder Patch (UN);
e. Armlet (Olive Drab);
f. Scarf (UN Blue); and,
g. "UN Peace-keeping force" identification card.

8. That the UN items listed in the preceding paragraph, except for the Metal Hat Badge (UN Blue), were issued to SPC New for the purpose of augmenting his U.S. Army battle dress uniform (BDU); that the Metal Hat Badge (UN Blue) would have been issued to SPC New at Camp Able Sentry in Macedonia for the same purpose; and, that SPC New would have been made to wear or carry these items on his U.S. Army battle dress uniform (BDU) while under Task Force Able Sentry.

9. That on arrival to Camp Able Sentry, the soldiers of 1-15 In, to include SPC New had he deployed with them, were issued the "UN Peace-keeping force" identification card; and, that the "UN Peace-keeping force" identification card is the only identity document required in the area of operation.

s/MICHAEL E. KLEIN
CPT, JA
Trial Counsel
Date: 18 JAN 96

s/MICHAEL G. NEW
SPC, USA
Accused
Date: 18 JAN 96

s/TONY RAIMONDO
MAJ, JA
Senior Defense Counsel
Date: 18 JAN 96

Record Pages 667 and 710
Trial testimony relied on by Judge Sullivan as having established "safety" purpose of UN uniform

[Page 667] from command structures--

CDC2: Objection; hearsay; no personal knowledge.

MJ: Overruled.

A. My awareness as I'm preparing the brief is that he has U.N. command structure problems, allegiance issues. Uniform? I don't know if I was specifically aware of the uniform; that might have been in there. There was a number of things that I had a general awareness of as far as he was concerned.

Q. And were those the issues that you understood were the concern of the command as to the entire battalion?

A. Exactly. My understanding was, the brief, as I had given it, was designed--at least I had designed it that way--to put to rest any question, any anxiety that a soldier might have about whether or not what his commander was asking him to do was clearly a legal, legitimate, valid thing to do.

ATC4: Nothing further.

MJ: No questions based upon that?

CDC2: No, Your Honor.

COURT EXAMINATION

Questions bar the Military Judge:

Q. Captain Klein, are you aware of whether there is a written OPORDER or OPPLAN for the mission?

A. Yes, I am.

Q. Is the uniform specified in the OPORDER or OPPLAN?

***

[Page 710]

Q. You understood the order?

A. Yes, sir, I did.

Q. That you were supposed to be present at formation on the 10th, at the time prescribed, with the U.N. uniform items on your uniform?

A. Yes, sir.

Q. It's also a fact that you were attached to Staff Sergeant Walker's squad in Alpha Company for that deployment, were you not?

A. Yes, sir.

Q. And it's a fact that Captain Palmateer was your deployment company commander?

A. Yes, sir.

Q. You would agree, as a matter of fact, that Captain Palmateer gathered the company around him on 4 October to discuss the deployment, isn't that true?

A. Actually, it was a safety briefing, sir.

Q. Did he talk about the order?

A. Yes, sir, he did.

Q. Yes, he did. And you were in that formation, were you not?

A. Yes, sir.

Q. You were no more than two to three feet away from him when he issued that order.

A. Five or six--close enough, sir.